TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 439.

THE ADIRONDACK RAILWAY COMPANY, PLAINTIFF IN ERROR,

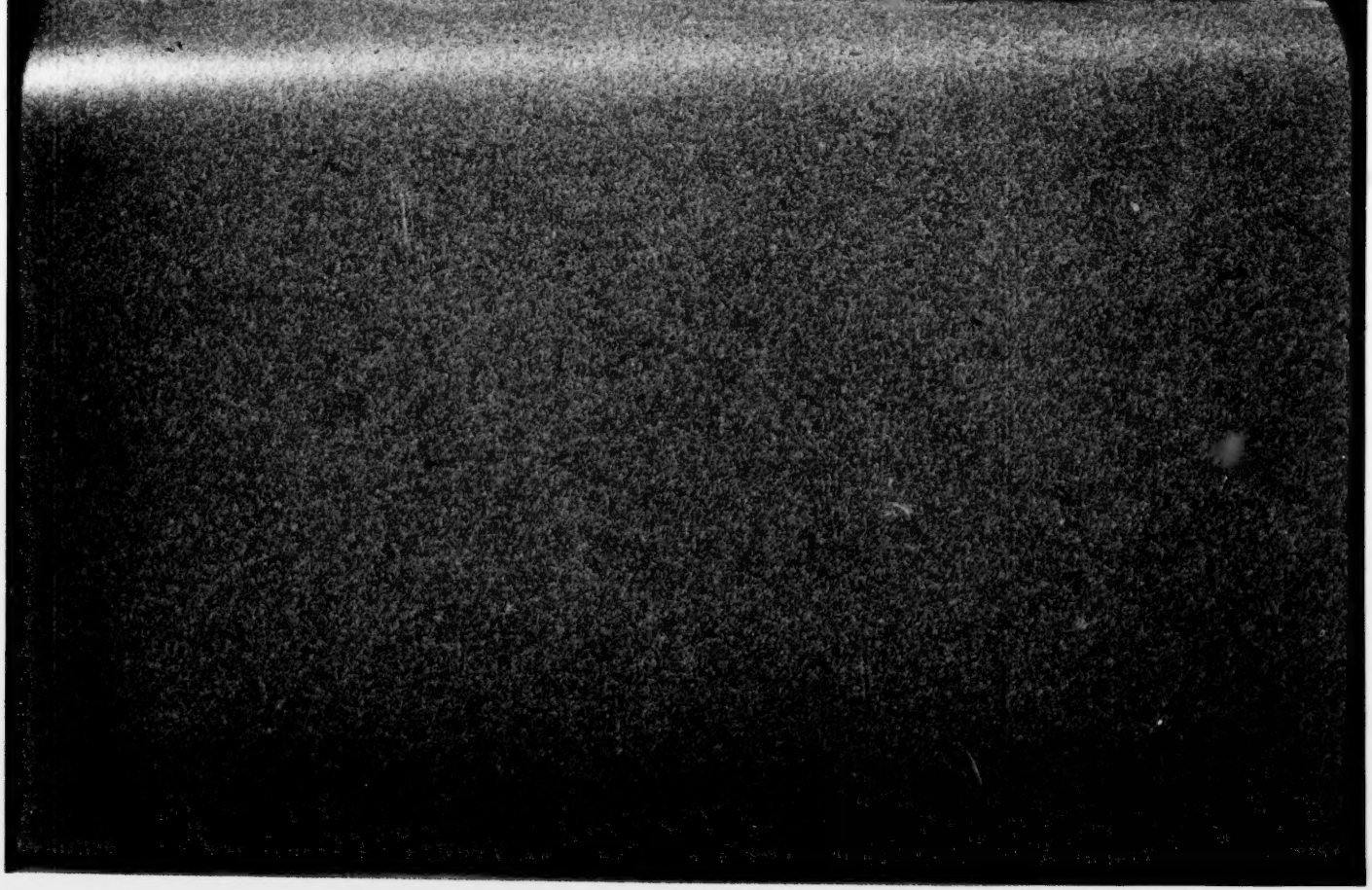
vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED NOVEMBER 3, 1899.

(17,553.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 17, 1899.

a UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable judges of the court of appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, being the highest court of law or equity of the State of New York in which a decision could be had in the suit between The People of the State of New York, plaintiffs, and The Adirondack Railway Company, impleaded, etc., defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Adirondack Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid,
b with all things concerning the same, to the Supreme Court of the United States, together with this writ, so you have the same at Washington within thirty days from the date of signing the citation, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the U. S. Circuit Court, Northern District N. Y.

Witness the Honorable Melville Weston Fuller, Chief Justice of the United States, the 17th day of October, in the year one thousand eight hundred and ninety-nine.

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States for the Northern District of New York.

The foregoing writ is allowed this 16th day of October, 1899.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

c [Endorsed:] In the Supreme Court of the United States. Adirondack Railway Company, plaintiff in error, *vs.* The

People of the State of New York, defendants in error. Original. Writ of error. R. Burnham Moffat, attorney for plaintiff in error, 63 Wall street, New York city. Filed Oct. 20, 1899.

d In the Supreme Court of the United States, October Term, 1899.

ADIRONDACK RAILWAY COMPANY, Plaintiff in Error,
against
THE PEOPLE OF THE STATE OF NEW YORK, Defendants in Error.

Petition for Allowance of Writ of Error.

To the honorable chief judge of the court of appeals of the State of New York:

The petition of the Adirondack Railway Company respectfully shows:

That on the 3rd day of October, 1899, the court of appeals of the State of New York rendered judgment against your petitioner in a certain cause wherein The People of the State of New York were plaintiffs and appellants and your petitioner was defendant and respondent, reversing an order theretofore made in your petitioner's favor by the appellate division of the supreme court of said State and affirming, with costs, a judgment entered in said suit upon the decision of the special term of said court adverse to your petitioner, as will more fully appear by reference to the record and proceedings in said cause, which are submitted herewith.

That said court of appeals is the highest court of the State of New York in which a decision in said cause could be had.

That your petitioner claims the right to remove said cause and the judgment therein rendered to the Supreme Court of the
e United States, pursuant to the statutes of the United States in such case made and provided, because manifest error hath been committed in its said judgment by said court of appeals, to the great and lasting damage of your petitioner, in that the validity of a treaty or statute of or an authority exercised under the United States was drawn in question and the decision was against their validity, or the validity of a statute of or an authority exercised under said State of New York was drawn in question, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States was drawn in question and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, all of which will more fully appear by reference to said record and proceedings in said cause herewith submitted.

Wherefore your petitioner, praying for the reversal of said judgment, prays the allowance of a writ of error returnable into the

Supreme Court of the United States and for citation and supersedeas.

And your petitioner will ever pray, etc.

ADIRONDACK RAILWAY COMPANY, *Petitioner.*

R. BURNHAM MOFFAT,
Attorney for Petitioner.

Endorsed: Filed October 20th, 1899.

Know all men by these presents that we, Acosta Nichols, of 36 East 31st street, New York, and J. Augustus Barnard, of 26 East 35th street, New York, are held and firmly bound unto The People of the State of New York in the just and full sum of five hundred dollars, to be paid to the said The People of the State of New York, their successors or their assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 13th day of October, in the year one thousand eight hundred and ninety nine.

Whereas lately, at a session of the court of appeals of the State of New York, at Albany, in a suit depending in said court between the said The People of the State of New York and one The Adirondack Railway Company, a judgment was rendered against the said Adirondack Railway Company, and the said Adirondack Railway Company being about to procure a writ of error and file a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The People of the State of New York, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Adirondack Railway Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be null and void; otherwise to be and remain in full force and virtue.

ACOSTA NICHOLS. [L. S.]
J. AUGUSTUS BARNARD. [L. S.]

Signed, sealed, and delivered in presence of—
R. BURNHAM MOFFAT.

The foregoing bond is approved this 16th day of October, 1899.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

I hereby approve the foregoing bond as to form and sufficiency of sureties.

JOHN C. DAVIS,
Attorney General of the State of New York, Attorney for Defendants in Error in Court Below,
By EDWARD WINSLOW PAIGE, *Of Counsel.*

Endorsed: Filed October 20, 1899.

h STATE OF NEW YORK, *ss*:

And now here the judges of the court of appeals of New York make return of this writ by annexing hereto and sending herewith under the seal of the court of appeals of New York a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

STATE OF NEW YORK, *ss*:

To all to whom these presents shall come, Greeting:

Know ye that among the records of our court of appeals, sitting at Albany, on the third day of October, one thousand eight hundred and ninety-nine, it is within contained, the following being, the entire record in the case:

On the twentieth day of March, eighteen hundred and ninety-nine, the appellants, The People of the State of New York, came into our court of appeals, by Hon. John C. Davies, attorney general of the State of New York, their attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court of the State of New York in the third judicial department, reversing the judgment of the special term of said supreme court and ordering a new trial of said cause, and The Adirondack Railway Company, the respondent in the said action, afterwards appeared in the said court of appeals by Lewis E. Carr, its attorney; which said notice of appeal and return thereto annexed are as follows:

i *Statement under Rule* 41.

This action was commenced by the service of the summons and of a copy of the complaint upon the defendant, The Adirondack Railway Company, on March 25, 1898.

Issue was joined on June 4th, 1898, by the service of the answer of the defendant, The Adirondack Railway Company.

None of the defendants, except The Adirondack Railway Company, have appeared in this action.

The names of the parties in full are:

The People of the State of New York, plaintiffs.

Adirondack Railway Company, Indian River Company, William McEchron, Phœbe A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley and John McGinn, defendants.

There has been no change of parties pending suit.

1 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs, *against* ADIRONDACK RAILWAY COMPANY, INDIAN RIVER COMPANY, WILLIAM MCECHRON, PHŒBE A. HITCHCOCK, JEREMIAH W. FINCH, DANIEL J. FINCH, EUGENE L. ASHLEY, AND JOHN MCGINN, DEFENDANTS.	Trial Desired in Albany County. Summons.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated New York, March 24th, 1898.

T. E. HANCOCK,
Attorney General, Plaintiff's Attorney, Albany, N. Y.

2 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs, *against* ADIRONDACK RAILWAY COMPANY, INDIAN RIVER COMPANY, WILLIAM MCECHRON, PHŒBE A. HITCHCOCK, JEREMIAH W. FINCH, DANIEL J. FINCH, EUGENE L. ASHLEY, AND JOHN MCGINN, DEFENDANTS.	Complaint.

Plaintiffs show to the court, on information and belief:

That in the month of May, 1897, the defendants, Ashley and McEchron, offered to the forest preserve board to sell to the plaintiffs, township number fifteen and about eighteen thousand acres of township thirty-two of Totten and Crossfield's purchase, for the sum of one hundred and forty-nine thousand dollars.

That those two townships lie wholly within the bounds of the forest preserve and also of the Adirondack park.

That on the sixth day of August, 1897, the offer was accepted by the forest preserve board, which then adopted and had regularly entered upon its minutes a resolution in the words and figures following:

"Resolved, That we accept the offer of Mr. McEchron and the other owners of about 18,000 acres of township 32, T. & C., and 24,000 acres of township 15 of the same purchase, including in this total acreage 8,000 acres, more or less, of the virgin forest land,

3 the major portion of the balance of said townships being well wooded, but lumbered of the soft timber, for the sum of $149,000.

"The above offer to include and carry with it Indian lake (sub-

ject to the right of the grantors to control the waters thereof so long as they maintain the structures at the outlet), and the improvements and structures at the outlet thereof both existing and in course of construction, and the grubbing, acquiring and clearing of the shores thereof, which shall hereafter be conducted in accordance with the plans and specifications to be furnished by the State engineer and surveyor.

"If the cost of such structures, improvements, acquiring and grubbing and clearing up of the shores of said lake under the plans and specifications of the State engineer be in excess of $50,000, such excess shall be added to said purchase price; and if less than $50,000, the difference shall be deducted therefrom."

That said Ashley and McEchron did not own all of the above lands, but they associated with themselves the other defendants, who are human beings, and together with them they formed the defendant Indian River Company, a corporation organized and existing under the laws of New York, and by proper deeds of conveyance vested in it the title to the above lands. That in pursuance of such contract with the forest preserve board, the Indian River Company prepared a deed to the plaintiffs of such lands, and was about to deliver the same, when its delivery was stopped by the injunction hereinafter mentioned.

That the defendant, Adirondack Railway Company, claims to be a railroad corporation organized and existing under the laws of New York and on the eighteenth day of September, 1897, it filed a map and profile for an extension of its railroad across the said township fifteen, and on the thirtieth of September, 1897, it brought against the other defendants the action, the summons and complaint in which are hereto annexed and contained in the papers marked "A." And upon the other papers therein contained,
4 it obtained the injunction therein contained and such further proceedings were had as are therein shown, and the injunction was continued by the order, a copy of which is therein contained.

On the sixth day of October, 1897, the Indian River Company deeded to the plaintiffs the said lands, excepting those described in the said map and survey, and on that day a deed of the lands described in said map and survey was placed in escrow to be delivered when the injunction should be dissolved, and on the same day the State engineer and surveyor and the members of the forest preserve board signed a paper, a copy of which is hereto annexed and marked "B," as their signatures therein appear, filed *in it* the office of the secretary of state and served upon the Indian River Company a notice of the said filing and the date of the filing of the description contained in paper "B," which notice contained the same description of the real property which is contained in paper "B," and on the eleventh of November, 1897, the forest preserve board and the comptroller paid to the Indian River Company the full sum of the purchase-money under the said contract, that is to say, the sum of ninety-nine thousand dollars, and thereupon the plaintiffs, through

their State engineer and surveyor and forest force, entered into possession of said lands.

The Adirondack Railway Company, before the eleventh of November, 1897, began proceedings against the other defendants to condemn the land described in said map and survey, and on the thirtieth day of November, 1897, those proceedings stood, and still stand to be heard on the twenty-first day of December, 1897.

Under the arrangements spoken of in the papers "C," the appeal in papers "A," was taken, noticed to be heard by the appellate division of the court for the second of December, 1897, and was the first case on the calendar for that day.

On the thirtieth of November, 1897, the defendant Ashley signed and sent to the Honorable J. P. Allds papers of which copies
5 are hereto annexed and marked "C," and on the first of December, 1897, he, being the attorney of record for the Indian River Company, and other of the defendants in said action, stipulated the appeal over the term.

That on the 14th day of January, 1898, the said appeal was heard by appellate division and the case was decided by the said appellate division on the second day of March, 1898, and by said decision said court ordered the order affirming the injunction reversed and the injunction dissolved, and thereupon the deed which was placed in escrow was delivered to the People of the State of New York, and has since been recorded.

That, nevertheless, the defendant, The Adirondack Railway Company, is still proceeding with its condemnation proceedings against the other defendants, and has obtained in each proceeding an order for the appointment of commissioners, the other defendants having made substantially no defense, and not having informed the forest preserve board, or any member of the State government of the fact that such proceedings were continuing, and that the defendant, The Adirondack Railway Company, threatens and intends to continue the said proceedings with a view of attempting to acquire title thereby to the said part of township 15.

Wherefore the plaintiffs demand judgment that the defendant, The Adirondack Railway Company, be enjoined temporarily from further continuing the said condemnation proceedings and any condemnation proceedings to take any part of, or any interest in, said lands, and that the other defendants be enjoined temporarily and perpetually from aiding or assisting the Adirondack Railway Company in obtaining any or any interest in any of said lands, and from refraining from opposing it, both in the said action and the said condemnation proceedings, and that the plaintiffs have such other and further relief as to the court shall seem just.

T. E. HANCOCK,
Attorney General, Plaintiff's Attorney.

6 ALBANY COUNTY, *ss:*

William F. Fox, being duly sworn, says that he has read the foregoing complaint; that the same is true of his own knowledge,

except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WILLIAM F. FOX.

Sworn to before me, 24th day of March, 1898.

WM. G. ARMSTRONG,
Notary Public, Albany County, N. Y.

"*A*" (*Referred to in Complaint*).

Record on appeal from order continuing injunction in suit of Adirondack Railway Company against Indian River Company and others.

Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY *against* INDIAN RIVER COMPANY, WILLIAM McECHRON, Phœbe A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn.	Preliminary Injunction with Order to Show Cause.

7 It appearing to my satisfaction from the complaint in this action verified the 29th day of September, 1897, supported by the affidavits of Lewis E. Carr, sworn to said 29th day of September, 1897, and of Charles B. Hibbard, sworn to this 30th day of September, 1897, that the plaintiff demands and is entitled to a judgment against the defendants, among other things restraining them, and each of them, their and each of their agents, attorneys and servants, from conveying or suffering the conveyance, either directly or indirectly, to the forest preserve board or the State during the pendency of this action of so much of that tract of land situated in Warren, Essex and Hamilton counties, and known as "township 15" of the Totten and Crossfield purchase as is comprised within the route adopted by plaintiff over said township, as shown on the maps filed by plaintiff in said counties, except said conveyance be expressly made and received subject to the right of way thereover of the plaintiff's said route;

And it appearing from said complaint that the continuance or commission of said acts during the pendency of this action would produce injury to the plaintiff;

And the plaintiff having duly given an undertaking as required by law;

Now, on motion of Lewis E. Carr, attorney for the plaintiff, it is

Ordered, that the defendants, The Indian River Company, William McEchron, Jeremiah W. Finch, Daniel J. Finch, Phœbe A. Hitchcock, Eugene L. Ashley and John McGinn, and each of them, their and each of their agents, attorneys and servants, and all other persons whatsoever, be, and they hereby severally are enjoined and restrained, until the further order of the court in this action, from conveying or suffering the conveyance either directly or indirectly

to the forest preserve board, or to the State, during the pendency of this action, of so much of that tract of land lying in the counties of Warren, Essex and Hamilton, and known as "township 15" on the Totten and Crossfield purchase, as is comprised within the route adopted by plaintiff over said township, as shown on the maps filed by plaintiff in the said counties, except such conveyance be expressly made and received subject to the right of way thereover of the plaintiff's said route.

8 And sufficient reason appearing from the afore-mentioned affidavit of Lewis E. Carr why less than eight days' notice of motion should be given;

Let the defendants, or their attorneys, show cause at a special term of this court, to be held at the court-house in Plattsburg, Clinton county, New York, on the 11th day of October, 1897, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why this injunction should not be continued during the pendency of this action, and why the plaintiff should not have such other and further relief as to the court may seem just.

Leave is hereby granted the plaintiff in support of said motion for the continuance of said injunction, to present upon the hearing thereof additional affidavits, provided a copy of such affidavits shall have been served on or before the sixth day of October, 1897, on the attorneys for such of the defendants as shall then have appeared herein by attorney.

Let this order and a copy of the complaint and affidavits, and a copy of the undertaking as approved by me, be served on or before the 6th day of October, 1897, on such of the defendants as can with reasonable diligence be found within the State of New York, and such service shall be sufficient.

Dated Salem, N. Y., September 30, 1897.

CHESTER B. McLAUGHLIN, *J. S. C.*

9 Supreme Court of the State of New York.

ADIRONDACK RAILWAY COMPANY *against* INDIAN RIVER COMPANY, WILLIAM McECHRON, Phœbe A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn.	Trial Desired in the County of Essex. Summons.

To the above-named defendants and to each of them:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated September 29th, 1897. LEWIS E. CARR,
Plaintiff's Attorney.

Office and post-office address, No. 56 North Pearl street, Albany, New York.

10 Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY
against
INDIAN RIVER COMPANY, WILLIAM McECHRON, Phœbe A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn. } Complaint.

The plaintiff, by Lewis E. Carr, its attorney, complaining of the defendants, for cause of action, shows upon information and belief:

First. That at all the times hereinafter mentioned, the plaintiff was and still is a domestic railroad corporation, organized and existing under chapter 430 of the Laws of 1874 and the acts amendatory thereof and supplementary thereto, and owned, maintained and operated a line of railway from Saratoga Springs, in the county of Saratoga, to the village of North Creek, in the county of Warren, with the right of extension of its said line from North Creek northward through the counties among others of Warren, Essex and Hamilton.

Second. That the defendant Indian River Company is a domestic corporation, organized and existing under the laws of the State of New York.

Third. That pursuant to the provisions of section six of the Railroad Law of the State of New York, and with the intention of making an extension of its road from North Creek, in the county of Warren, to Long Lake, in the county of Hamilton, there to connect with the line of the Long Lake Railroad Company, and by
11 means of it and its connecting lines secure a direct route through the counties of Franklin and St. Lawrence, and over the new international railroad bridge, now in process of construction across the St. Lawrence river at Cornwall, to the city of Ottawa, in the Dominion of Canada; and before constructing any part of such extension or instituting any proceedings for the condemnation of real property in either of the counties of Warren or Essex or Hamilton, in which counties in part such extension is to be made, the plaintiff duly made or caused to be made a separate map and profile duly certified by its president and engineer, of the route adopted by it in each of said counties, and caused said maps to be filed on the 18th day of September, 1897, in the offices of the clerks of the counties of Warren, Essex and Hamilton, respectively.

Fourth. That a portion of the route so adopted by plaintiff as aforesaid, passes over a tract of land lying a part thereof in each of said counties of Warren, Essex and Hamilton, which tract is known as "township 15" of the Totten and Crossfield purchase, the title to which tract is owned or claimed to be owned by the defendants herein, some or all of whom are the actual occupants of that portion of said tract over which the route so adopted passes, and are the only actual occupants thereof.

Fifth. That forthwith, upon the filing of said maps and pursuant to the provisions of section six of said railroad law, the plaintiff gave written notice to each of the defendants herein except to the

defendant Jeremiah W. Finch, whom it has not as yet been able to serve, stating the time when and place where each of such maps and profiles was filed, and that the route so adopted by plaintiff passed over lands occupied by them respectively.

Sixth. That said tract known as "township 15" as aforesaid, lies within the limits of the Adirondack park as defined and limited in and by the fisheries, game and forest law, and also within the
12 limits of the forest preserve as defined and limited in and by said law.

Seventh. That section seven of article seven of the constitution of the State of New York provides as follows:

"The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

Eighth. That in and by chapter 220 of the Laws of 1897, entitled "An act to provide for the acquisition of land in the territory embraced in the Adirondack park, and making an appropriation therefor," a board known as the "forest preserve board" was constituted, with power, among other things, to acquire for the State, by purchase, lands lying in the territory embraced in said Adirondack park.

Ninth. That the defendants, well knowing the above-stated facts, and further knowing that if title to said "township 15" be once vested in the State, no portion thereof can be taken by this plaintiff for the purposes of its said railroad extension, whether under condemnation proceedings allowed by statute or otherwise, and with the wrongful intention of defeating and forever barring plaintiff of its statutory right to acquire the necessary right of way through and over said "township 15," have threatened to convey forthwith and are about to convey absolutely to the forest preserve board for the State said "township 15," and particularly the portion thereof over which the route so adopted by plaintiff as aforesaid passes, without in anywise limiting such conveyance as subject to plaintiff's right of way over the lands contained within said township, or preserving or suffering the preservation of the statutory rights acquired by plaintiff upon the filing of its maps as aforesaid.

13 Tenth. That the conveyance of said lands by the defendant as aforesaid, except as subject to plaintiff's right of way thereover, will work an irreparable injury to plaintiff, in that it will, under the provisions of the constitution above recited, wholly deprive the plaintiff of its statutory right to acquire said right of way by condemnation proceedings or otherwise, and as the lands adjacent to said "township 15," on either side thereof, said lands being also within the limits of said forest preserve, have already been acquired and are owned by the State, will absolutely deprive plaintiff of its right to extend its road as aforesaid, and put it to a great and irreparable loss.

Eleventh. That unless immediately restrained by order of the court pending this action, the defendants will make their threatened conveyance of said "township 15" as aforesaid to the great and

lasting injury of the plaintiff, and such conveyance would render any judgment which plaintiff may obtain herein wholly ineffectual and impossible of execution.

Twelfth. That the plaintiff is wholly without any adequate remedy at law, and unless this court shall grant its equitable aid and prevent said threatened conveyance and the wrongful and total destruction by defendants of the plaintiff's aforesaid rights, this plaintiff will be remediless in the premises.

Wherefore, plaintiff prays judgment:

1. That an order may be made restraining the defendants and each of them and their and each of their attorneys, agents and servants, from conveying or suffering the conveyance, either directly or indirectly, to the forest preserve board or to the State during the pendency of this action, of so much of said tract known as "township 15" as is comprised within the route adopted by the plaintiff over said township as shown on said maps filed by plaintiff in Warren, Essex and Hamilton counties, except said conveyance be expressly made and received subject to the right of way thereover of the plaintiff's said road.

14 2. That defendants may be perpetually enjoined and restrained from conveying or suffering such conveyance of such portion of said township except as aforesaid.

3. That plaintiff may have such other and further relief as to the court may seem just.

4. That plaintiff may recover the costs of this action.

LEWIS E. CARR,
Attorney for Plaintiff.

STATE OF NEW YORK, }
City and County of New York, } ss.:

Charles A. Walker, being duly sworn, says:

I am the secretary of The Adirondack Railway Company, the plaintiff above named. I have read the foregoing complaint and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is made by me and not by the plaintiff, is that the plaintiff is a corporation.

The sources of my information and the grounds of my belief, as to all matters not stated upon my own knowledge, are as follows:

Organization of the plaintiff company, and its right of extension northward through the counties of Warren, Essex and Hamilton; the organization of the defendant Indian River Company; the filing of the maps and the service of the respective notices thereof, the location of the route through "township 15;" the ownership thereof; the location of said tract within the limits of the Adirondack park and of the forest preserve; the provisions of the constitution of the State of New York, and of chapter 220 of the Laws of 1897; the threatened conveyance of said township to the forest preserve board or to the State, and the legal effect of such conveyance upon the plaintiff's rights, all from statements made to me by

the general counsel of the plaintiff company, who has charge
15 or supervision, on behalf of said company, of such matters pertaining to it.

CHAS. A. WALKER.

Sworn to before me this 29th day of September, 1897.

WILLOUGHBY L. WEBB,
Notary Public (138) *N. Y. Co.*

Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY
against
INDIAN RIVER COMPANY, WILLIAM McECHRON, PHOEBE A. HITCHcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn.

COUNTY OF ALBANY, *ss:*

Lewis E. Carr, being duly sworn, says:

I am attorney for the plaintiff herein.

The next special term of the supreme court in the county of Essex, where this action is triable, is appointed to be held on the third Monday of October, 1897. This case is not at issue, nor has the summons, which is hereto annexed, as yet been served. A preliminary injunction is prayed for to accompany such summons.

In view of the fact that the conveyance referred to in said complaint is threatened to be made, and as I verily believe will be made, on the first day of October, 1897, and because of the pressing necessity of securing a preliminary injunction at once, it has been
16 impossible in the short space of time since this matter has been placed in my hands to prepare or obtain all the affidavits that I desire to submit on the motion for a continuance of the injunction; and I therefore ask leave to submit upon the hearing of such motion additional affidavits in behalf of the plaintiff in support thereof, with the provision that a copy of such affidavits shall be served at least one day before the return day of said order to show cause upon the attorneys for such of the defendants as shall then have appeared herein by attorney.

The reason that an order to show cause returnable in less than eight days why the preliminary injunction should not be continued *pendente lite* is asked for, instead of giving the customary eight days' notice of motion, is because it is the accepted practice on motions to continue a preliminary injunction, granted to accompany the summons, that an order be made requiring the defendants to show cause why such injunction should not be continued *pendente lite*, and that the restraining force of such preliminary injunction should continue until the hearing of the motion; and said order is made returnable in less than eight days, because by the Code of Civil Procedure and by the General Rules of Practice, orders to show cause, when granted, shall be made returnable in less than eight days.

No previous or other application for an injunction or for an order to show cause herein has been granted.

LEWIS E. CARR.

Sworn to before me this 28th day of September, 1897.

HIRAM W. COWLBECK,
Notary Public, Albany Co.

17 Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY
vs.
INDIAN RIVER COMPANY, WILLIAM MCECHRON, ET AL.

CITY AND COUNTY OF ALBANY, *ss.*:

Charles B. Hibbard, being duly sworn, says:

I am president of the Northern New York Railroad Company, and am a director of the Long Lake Railroad Company referred to in the complaint herein.

Maps of the extension of the plaintiff's road from North Creek to Long Lake, duly certified by the president and engineer of said company, and showing the route adopted in each of the counties of Warren, Essex and Hamilton, were filed on the 18th day of September, 1897, in the offices of the clerks of said counties, respectively, and written notice of the filing of such maps was given to each of the defendants, pursuant to law, except to the defendant, Jeremiah W. Finch, whom it has been impossible as yet to serve with such notice, although diligent effort to that end has been and is being made.

Said route as adopted passes over township 15 of the Totten and Crossfield purchase, which is occupied or owned by some or all of the defendants herein, and by no other persons whatever.

Since the filing of said maps and the service of said notice, and on the 29th of September, 1897, I conversed with the defendant Ashley relative to the threatened transfer by the defendant of said township to the forest preserve board for the State, said Ashley being also a lawyer and in charge, as I am informed and
18 believe, of the legal matters pertaining to said threatened transfer. He declined, however, to limit the conveyance which he conceded the defendants were about to make as subject to plaintiff's right of way over said township, although I had pointed out to him and he fully understood that a conveyance without such limitation would wholly deprive plaintiff of its statutory right to acquire the same by condemnation proceedings or otherwise, and would absolutely prevent the construction of said extension. He curtly replied that he would be on hand before the forest preserve board at its meeting on Friday morning, October 1st, and gave me to understand and I verily believe it was and is his intention and the intention of the defendants to convey said township to the State on that morning absolutely and without any reservation or restriction whatever as to plaintiff's right of way thereon. The defendants

Jeremiah W. Finch and William McEchron had previously intimated to me their intention of making such conveyance in total disregard of plaintiff's said rights, and I am informed and believe said board is willing to accept such transfer.

C. B. HIBBARD.

Sworn to before me this 30th day of September, 1897.

C. L. GOVE,
[L. S.] *Notary Public, Albany Co., N. Y.*

19 Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY
against
INDIAN RIVER COMPANY ET AL.

CITY AND COUNTY OF NEW YORK, *ss.:*

Charles B. Hibbard, being duly sworn, says:

I am the president of the Northern New York Railroad Company, the New York & Ottawa Railroad Company, and of the Ottawa & New York Railway Company, and am vice-president of the Cornwall Bridge Company. I also have an interest in the Long Lake Railroad Company and in the Racquette River Railroad Company.

The Ottawa & New York Railway Company is incorporated under the laws of the Dominion of Canada and is authorized to construct, maintain and operate a railway from the city of Ottawa to the city of Cornwall, in the province of Ontario, and a railway bridge from the city of Cornwall to the international boundary line.

The Cornwall Bridge Company is a corporation organized and existing under the laws of the State of New Jersey, for the purpose of maintaining and owning a bridge over the St. Lawrence river from the international boundary line to a point in the county of St. Lawrence near the easterly boundary thereof.

The New York & Ottawa Railroad Company is a domestic corporation duly authorized to construct, maintain and operate a railroad from the southerly terminus of said international bridge to the village of Moira.

20 The Northern New York Railroad Company is a domestic corporation owning and operating a line from the village of Moira to the village of Tupper Lake.

The incorporators and directors of the Racquette River Railroad Company, which is duly authorized to construct, maintain and operate a railroad from the village of Tupper Lake to the hamlet of Axton, and the incorporators and directors of the Long Lake Railroad Company, which is duly authorized to construct, maintain and operate a line of railway from said hamlet of Axton to the outlet at the northern extremity of Long lake, have signified to me their readiness to enter into such agreement, traffic or otherwise, as will secure a continuous line under a single management from Ottawa,

in the Dominion of Canada, across said international bridge to the head of Long lake. Said railroad companies, except the Racquette River Railroad Company and the Long Lake Railroad Company, and said bridge company are owned and controlled by a single interest.

The line of railway of the Ottawa & New York Railway Company is now nearly completed and will be ready for train service within a few months at the furthest, as I am informed and verily believe.

The contract for the construction of the international bridge across the St. Lawrence river has been awarded to the Phœnix Bridge Company of Pennsylvania and work thereon has been commenced and the construction of said bridge is being pushed as speedily as possible, and will be continued until completion. Said bridge will be ready for train service not later than the spring or early summer of 1898, as I am informed and verily believe.

The line of the New York & Ottawa Railroad Company is now being graded, a certificate under § 59 of the railroad law having been granted only on the 17th of September, 1897, and the completion of said line will be pushed as rapidly as possible. Said line will be ready for train service not later than the spring or early summer of 1898, possibly before the first of January, 1898, as I am informed and verily believe.

21 The line of the Northern New York Railroad Company is completed and in actual operation. Said line, however, will be improved and the equipment of said road enlarged.

Appreciating the necessity and utility of a line into and through the Adirondack wilderness to connect with the line of the Adirondack railway at North Creek, and thence to Saratoga, Albany and New York, with the numerous connections which such line will afford, I have assisted said Adirondack Railway Company so far as I have been able, in their effort to secure a right of way for the extension of said line from North Creek to Long Lake. During the course of the assistance so rendered by me, I have ascertained and am able to depose as of my own knowledge to sundry facts connected with the location of its said route, and I do depose that on September 18th, 1897, a map and profile of the route adopted by said Adirondack Railway Company in the county of Warren, duly certified by the president and engineer of said company, was filed in the office of the clerk of said county; and that likewise and on said day a map and profile of the route adopted by said Adirondack Railway company in the county of Hamilton, duly certified by the president and engineer of said company, was filed in the office of the clerk of said county of Hamilton; and that on said day a map and profile of the route adopted by said Adirondack Railway Company in the county of Essex, duly certified by the president and engineer of said company, was filed in the office of the clerk of said county of Essex.

And I do further depose of my own knowledge that the surveys for said road were made between the first of September, 1896, and the first of June, 1897.

A portion of the route so adopted by the Adirondack Railway Company crosses the tract of land known as township 15 of the Totten and Crossfield purchase, which township lies a part thereof in Warren county, a part thereof in Hamilton county and a part thereof in Essex county. The route so adopted passes over each of
22 said parts. Said lands are wild lands, no portion of the route adopted by the plaintiff in said township being under cultivation.

I am informed and believe that the defendants are the owners of said township, the sources of my information and the grounds of my belief being statements to that effect made to me by sundry of the defendants themselves.

Written notice of the filing of said maps, pursuant to § 6 of the railroad law, was, between the 18th and 25th days of September, 1897, given to the several defendants herein, except to the defendant Jeremiah W. Finch, as I am informed and believe. The sources of my information and the grounds of my belief are the written statements of Smith Philley, William D. Carr, and John J. Healey, Jr. The reason their affidavits are not hereto annexed is that they are none of them present or accessible to me and I cannot obtain their affidavits in time for their service upon such attorneys for the defendants as shall have appeared herein on or before the sixth of October, 1897, which, as I am informed and believe, is the time limited in the order of Mr. Justice McLaughlin for the service of additional affidavits in support of the injunction obtained by plaintiff herein. Since the commencement of this action a written notice of the filing of said maps in each of said counties was served upon the defendant Jeremiah W. Finch. Said service was effected on the 1st day of October, 1897, as appears from the affidavit of Joseph E. Haggerty, hereto annexed. Each of such written notices so served upon the defendants stated the time and place such maps and profiles respectively were filed and that the route adopted by said Adirondack Railway Company passed over the lands occupied by them respectively. I know this to be the fact from having seen said notices.

The route adopted by said Adirondack Railway Company enters upon said township 15 on the southerly boundary thereof and leaves it on the northerly boundary thereof.

Said township is bounded on the easterly by lands already acquired by the State and on the westerly by township 32 of
23 the Totten & Crossfield purchase. A part of said township 32 is owned by the State absolutely and a part thereof in a joint and undivided ownership with other persons. I have been informed by the defendant Ashley and by one Spier, the secretary of the Indian River Company, and by the counsel who represented them on the application made on the 4th of October, 1897, before Mr. Justice McLaughlin to vacate upon the papers the preliminary injunction obtained by plaintiff herein that township 32 is also owned by these defendants, and that they have contracted to sell the same to the State. If such sale be consummated, as I verily believe it will be, and if township 15 be also acquired by the State

without the reservation of the statutory right belonging to plaintiff to acquire a right of way thereover, it will be impossible by reason of the inhibition contained in article 7 of § 7 of the constitution for plaintiff to avail itself of its right to extend its line of road from North Creek to Newcomb and thence to Long Lake.

Plaintiff has already acquired by purchase portions of its rights of way in other townships over which its route as adopted passes.

CHARLES B. HIBBARD.

Sworn to before me this 5th day of October, 1897.

WILLOUGHBY L. WEBB,
Notary Public (138), *N. Y. Co.*

24 Supreme Court, County of Essex.

ADIRONDACK RAILWAY COMPANY
against
INDIAN RIVER COMPANY ET AL.

CITY AND COUNTY OF NEW YORK, *ss.*:

David Willcox, being duly sworn, says:

I am the general counsel and a director of the plaintiff herein, and have been such since the year 1889. I have become thoroughly familiar with the past history of the property.

Said plaintiff is a domestic railroad corporation, organized under the provisions of chapter 430 of the Laws of 1874 and the acts amendatory thereof and supplementary thereto. Its articles of association were filed and said company was incorporated on July 7th, 1882.

Said plaintiff is the successor in interest and rights of the "Adirondack Company," the articles of association of which company were filed in the office of the secretary of state on October 24, 1863, pursuant to chapter 236 of the Laws of 1863, entitled "An act to facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness in the northern part of this State, and the development of the resources thereof." Said articles of association recited that the places from and to which said railroad should be constructed, maintained and operated, among others, were as follows:

"1. From some point in the town of Hadley, in the county of Saratoga, up and along the valley of the upper Hudson to some point in the town of Newcomb, in the county of Essex."

25 And the names of the counties in which the railroad is to run are, among others, Saratoga, Warren, Essex, and Hamilton.

By chapter 250 of the Laws of 1865, said Adirondack Company was authorized to amend its articles of association so as to enable it under the general law to extend its railroad to some point on Lake Ontario or on the River St. Lawrence. Pursuant to the authority contained in said act said Adirondack Company on March

1st, 1871, filed in the office of the secretary of state its amended articles of association, wherein it was recited that in addition to the places from and to which the railroad of said company was to be constructed, maintained and operated, as stated in its original articles of association, said railroad was to be constructed, maintained and operated from a point in the town of Newcomb, in the county of Essex, to a point on the River St. Lawrence, in the town of Oswegatchie, in the county of St. Lawrence.

By chapter 864 of the Laws of 1872, entitled "An act to authorize the Adirondack Company to construct and operate a branch of its railroad from its main line to the northern bounds of the State," said Adirondack Company was authorized to construct and operate such branch, to commence at some point on its line between the south line of the town of Thurman, in the county of Warren, and the north line of the town of Newcomb, in the county of Essex, and running thence to the northern bounds of this State, in either of the towns of Mooers or Champlain, in the county of Clinton.

Under the authority thus conferred upon it by law, said Adirondack Company, after its incorporation, laid out its line of road, and thereafter constructed and put in operation sixty miles thereof, or thereabouts, from Saratoga to the village of North Creek, in the county of Warren.

All the property, rights, privileges and franchises of said Adirondack Company were duly sold under the foreclosure of a mortgage thereon, and upon the incorporation of the plaintiff company, in the year 1882, all of said property, rights, privileges and franchises of said Adirondack Company were thereupon transferred to
26 and became vested in said plaintiff company, and the same have at all times since and now are vested in said plaintiff.

In order to relieve itself from the obligation of then constructing the entire length of its line beyond the portion thereof constructed at the time it acquired title to said railroad properties and franchises which were formerly of the Adirondack Company, said plaintiff not deeming it expedient to extend its road at that time beyond North Creek, did in or about the month of April, 1892, pursuant to section 83 of the railroad law, make application to the board of railroad commissioners of the State of New York for a certificate relieving said railroad company from the obligation or necessity of then completing the extension of its said line; and thereafter and on or about the 9th day of May, 1892, said board of railroad commissioners issued its certificate certifying that in its opinion the public interests, under all the circumstances, did not require the extension of the road of the Adirondack Railway Company beyond the portion thereof constructed at the time the said company acquired title to said railroad property and franchises, namely, beyond North Creek, in the county of Warren.

Thereafter and during the summer of 1897, the New York & Ottawa Railroad Company was incorporated under the laws of the State of New York, with the right to construct a line of railroad from a point on the south bank of the St. Lawrence river, in St. Lawrence county, to the village of Moira, where it will connect with the

line of the Northern New York Railroad Company, now running and in actual operation from said village of Moira to the village of Tupper Lake, in the county of Franklin. The board of railroad commissioners on September 17th, 1897, as I am informed and believe, granted to said New York & Ottawa Railroad Company a certificate under section 59 of the railroad law.

As I am informed and believe, an international bridge is now in process of construction across the St. Lawrence river from the northern terminus of said New York & Ottawa Railroad
27 Company to the city of Ottawa, in the Dominion of Canada, and a new line of railway known as the Ottawa & New York Railway Company, incorporated under the laws of the Dominion of Canada, as I am informed and believe, has nearly completed the construction of its line of road from Cornwall to the city of Ottawa.

As I am also informed and believe, the certificate of incorporation of the Racquette River Railroad Company was filed with the secretary of state on or about the 27th of April, 1895, the line of road to be constructed, maintained and operated by said railroad company to be from said village of Tupper Lake to the hamlet of Axtun, all in the county of Franklin; and on or about the first day of July, 1895, the board of railroad commissioners granted to said Racquette River Railroad Company a certificate under section 59 of the railroad law.

As I am further informed and believe, on or about July 5th, 1895, the certificate of incorporation of the Long Lake Railroad Company was filed in the office of the secretary of state, the line to be constructed, maintained and operated by said railroad company to be from the said hamlet of Axtun to the outlet at the northern extremity of Long Lake, all in the county of Franklin and the county of Hamilton; and thereafter and on or about the 13th day of January, 1897, and pursuant to the order of the appellate division of the supreme court for the third department, entered December 14th, 1896, the board of railroad commissioners issued to said Long Lake Railroad Company a certificate uuder section 59 of said railroad law.

The sources of my information and the grounds of my belief as to the dates and matters above stated upon information and belief, are certified copies of the certificates of incorporation, and statements made to me by the counsel for said New York & Ottawa Railroad Company, said Northern New York Railroad Company, said bridge company, and said Ottawa & New York Railway Company.

Since the granting of the charters and the commencement of construction of a continuous line from the outlet, at the northern extremity, of Long Lake to the city of Ottawa, in the Do-
28 minion of Canada, said Adirondack Railway Company has deemed it both expedient and necessary to extend its line northward from North Creek to the said northerly terminus of Long Lake, there to connect with said continuous line of railway aforementioned. Furthermore, in view of the provisions of article

seven of section seven of the constitution of the State of New York, which requires that land within the limits of the forest preserve once acquired by the State shall forever remain wild land, which provision may be held to prevent said railway company from extending its route northward after acquisition by the State of said lands, and to render said forest preserve and Adirondack park available to those who would use it for the purpose designed by the act limiting said Adirondack park, and at the urgent solicitation of persons interested in the locality to be affected thereby, said plaintiff company deems it expedient now to extend its railroad from North Creek to Long Lake, a distance of forty miles, or thereabouts, and intends in good faith to acquire said lands by purchase or by condemnation, and to construct forthwith its line of railway thereon.

The route adopted by the plaintiff company for its extension from North Creek, as shown on the maps filed in the counties of Warren, Essex, and Hamilton, extends through parts of Warren, Hamilton and Essex counties to the town of Newcomb, and thence through Essex and Hamilton counties to the outlet at the northern extremity of Long Lake aforesaid. By connecting at Long Lake with the line of said Long Lake Railroad Company and its connecting lines, said Adirondack Railway Company will have a direct railroad connection by means of the Long Lake railroad, the Racquette River railroad, the Northern New York railroad, and the Ogdensburgh & Lake Champlain railroad, with the northern boundary of the said State in the town of Mooers, in the county of Clinton.

Said plaintiff has acquired by purchase a portion of its right of way from North Creek to Long Lake as described on said maps, and desires to preserve its statutory right to acquire the right of way located by it across "township 15" of the Totten and Crossfield purchase. No part of said road from North Creek to Long Lake has as yet been constructed, nor has any condemnation proceeding as yet been instituted.

29

DAVID WILLCOX.

Sworn to before me this 5th day of October, 1897.

WILLOUGHBY L. WEBB,
Notary Public (138), *N. Y. Co.*

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Joseph E. Haggerty, being duly sworn, says:

I am of the age of twenty-one years and upwards, and reside in the city of Brooklyn, in the State of New York.

On the first day of October, 1897, at the Atlanta hotel, Asbury Park, in the State of New Jersey, between the hours of 3.30 and 4.00 in the afternoon of said day, I served written notices of the filing of the map and profile of the route adopted by the Adirondack Railway Company in the counties of Warren, Hamilton and Essex, re-

spectively, upon Jeremiah W. Finch, by then and there delivering such written notices to and leaving the same with him.

And at the time of such service I knew the person to whom such notice was so delivered to be said Jeremiah W. Finch.

JOSEPH E. HAGGERTY.

Sworn to before me this 5th day of October, 1897.

WILLOUGHBY L. WEBB,
[L. S.] *Notary Public* (138), *N. Y. Co.*

30 Supreme Court.

ADIRONDACK RAILWAY COMPANY
against
INDIAN RIVER COMPANY, WILLIAM MCECHRON, PHŒBE A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn.

WARREN COUNTY, *ss.*:

Eugene L. Ashley, being duly sworn, says that he is an attorney and counselor of the supreme court, and one of the defendants in the above-entitled action, and that, in connection with William McEchron, William E. Spier and others, deponent commenced negotiations with State Engineer Adams, who then was and is one of the forest preserve board, and who acted in behalf of the State, and deponent and others made an offer to said board to sell to the State of New York township No. fifteen and about eighteen thousand acres of township thirty-two, of Totten & Crossfield's purchase, as early as in the month of May last; that said negotiations were continued from time to time with said Adams and the other members of said board down to the 6th day of August, 1897, when said offer of deponent, said McEchron and others was accepted by said board, which, at a regular meeting thereof, on the last-mentioned day, adopted a resolution, of which the following is a copy, to wit:

"Resolved, That we accept the offer of Mr. McEchron and the other owners of about 18,000 acres of township 32, T. & C., and 24,000 acres of township 15 of the same purchase, including in this
31 total acreage 8,000 acres more or less of virgin forest land, the major portion of the balance of said townships being well wooded but lumbered of the soft timber, for the sum of $149,000.

The above offer to include and carry with it Indian lake (subject to the right of the grantors to control the waters thereof so long as they maintain the structures at the outlet) and the improvements and structures at the outlet thereof both existing and in course of construction, and the grubbing, acquiring and clearing of the shores thereof, which shall hereafter be conducted in accordance with the plans and specifications to be furnished by the State engineer and surveyor.

If the cost of such structures, improvements, acquiring and grubbing and clearing up of the shores of said lake under the plans and

specifications of the State engineer, be in excess of $50,000 such excess shall be added to said purchase price; and if less than $50,000 the difference shall be deducted therefrom."

That deponent, said McEchron and others acting with them, did not then own all of said township 15 and of the 18,000 acres of said township 32, but on the strength and faith of the contract made with said board as aforesaid, and at great cost and expense, made arrangements, purchases and bargains before the filing of said map on the 18th day of September, 1897, whereby they became and were in a position to transfer a good title in fee to said State ofall of said lands, and were able to perform said contract on their part with said board.

That prior to the time of making said agreement with said board, deponent, said McEchron and others acting with them in the premises, had not, nor had any or either of them, so far as deponent has any knowledge, information or belief any knowledge or information that the plaintiff was intending or contemplating instituting any proceedings to acquire a right of way through, over or across said township number 15, or through, over or across any part thereof. That while it is stated in one of the affidavits on which the motion here is founded that the survey for the proposed railroad was
32 made between September, 1896, and June, 1897, no explanation or reason is assigned or given why the maps, &c., were not filed till about a month and a half after said contract had been made by said board with deponent, said McEchron and others. Deponent further states on information and belief, that it was not till after the promoters of said proposed railroad had heard of the bargain to sell said land to the State as aforesaid that they took any steps to file maps or any other proceedings looking to procuring a right of way over said lands; deponent further states, on information and belief, that it was in consequence of the contemplated action of deponent, said McEchron and others who acted in concert with them, and of said board, to consummate said bargain by a transfer of the lands as aforesaid to the State, that the plaintiff filed said maps or took any steps showing any intention to avail itself of any condemnation proceedings of said land.

Deponent denies, in the broadest and most unequivocal terms, each, every and all of the allegations of any wrongful or other intention whatever of deponent (or of each, any and every defendant in this action, so far as deponent has any knowledge, information or belief), of defeating or barring plaintiff of any statutory or any other right whatever. That all the proceedings on the part of deponent, said McEchron and others whatever in, concerning, or about said negotiations and contract to sell said lands to the State, were taken and had in good faith and solely to realize on said property and for the purpose of obtaining the consideration therefor from and on the part of the State, and without any intention to injure plaintiff, or any one, or any other intention than to consummate said trade in good faith and reap the fruits of their bargain.

EUGENE L. ASHLEY.

Subscribed and sworn to before me this 15th day of October, 1897.

CASS C. LA POINT,
Notary Public, Warren Co.

33 WARREN COUNTY, *ss:*

William McEchron, being duly sworn, says, that he is one of the defendants in the foregoing-entitled action, and is the president of The Indian River Company, another defendant in said action; that deponent has heard read the preceding affidavit in the foregoing-entitled action, made by Eugene L. Ashley, and verified on the — day of October, A. D. 1897, and that the same is true and correct in all respects, and as to each, every and all the statements and denials therein contained, so far as deponent has any knowledge, information or belief as to or concerning said statements and denials.

WM. McECHRON.

Subscribed and sworn to before me this 15th day of October, 1897.

CASS C. LA POINT,
Notary Public, Warren Co.

Supreme Court.

ADIRONDACK RAILWAY COMPANY, Plaintiff,
against
INDIAN RIVER COMPANY, WILLIAM McECHRON, PHEBE A. HITCHCOCK, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn, Defendants.

Application having been made by and on the part of the plaintiff to postpone the hearing on the order to show cause in this
34 action, returnable at a special term of this court, at the court-house in Plattsburg, on the 11th day of October, 1897, until October 16th, 1897:

Now, therefore, for the accommodation of the plaintiff, and in consideration of its agreements hereinafter contained, it is hereby stipulated and agreed as follows:

First. That the hearing on said order to show cause stand over to be heard at a special term on the 16th day of October, 1897, at the court-house, in Plattsburg, at 10 o'clock a. m. of that day.

Second. That the rights of all parties hereto shall be the same at the time of and on the hearing, and decision on said order to show cause as though there had been no postponement of such hearing—not only as to the motion or order to show cause, but also in all other proceedings and respects by or on the part of the plaintiff for acquiring any title to any of the land mentioned or described in the complaint herein—that the intervening time between October 11th, 1897, at 10 o'clock a. m., and the time of hearing and decision on said order to show cause shall not count, nor be considered in

any computation of time in or as to any proceeding, nor as to the lapse of any time required by law or otherwise for any step, steps or proceedings as a foundation or condition precedent for any subsequent or other proceedings whatever for or towards condemnation proceedings in land in township 15 of Totten and Crossfield's purchase.

It is the intention of the parties that neither party shall gain or use any rights or advantages by such postponement, and that the rights of the parties in all respects on the hearing of said order to show cause shall be the same as though it was heard and decided at the time it was originally returnable.

In the event, however, of the adjournment of the special term appointed to be held October 11th, 1897, because of the inability of Judge Kellogg to attend and hold the same on that day, the limitations contained in this stipulation as to proceedings and acquiring new rights shall only apply to the period between the time
35 when said order to show cause might have been heard in due course, and the date above mentioned to which the postponement thereof is herein made.

Dated October 9th, 1897.

LEWIS E. CARR, *Att'y for Pl'ff.*
S. & L. M. BROWN, *Att'ys for D. J. Finch.*
ASHLEY, WILLIAMS & FOWLER,
Att'ys for Indian River Co.

At a special term of the supreme court, held in and for the county of Clinton, at the court-house in the village of Plattsburg, N. Y., on the sixteenth day of October, 1897.

Present: Hon. S. A. Kellogg, justice.

Supreme Court, Essex County.

ADIRONDACK RAILWAY COMPANY, Plaintiff,
against
INDIAN RIVER COMPANY, WILLIAM McECHRON, PHEBE A. HITCHCOCK, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn, Defendants.

An order having heretofore and on the thirtieth day of September, 1897, been granted by Hon. Chester B. McLaughlin,
36 justice, restraining the defendants and each of them, their and each of their agents, attorneys and servants and all other persons whatsoever until the further order of the court in this action from conveying or suffering the conveyance either directly or indirectly to the forest preserve board or to the State during the pendency of this action of so much of that tract of land lying in the counties of Warren, Essex and Hamilton and known as township 15 on the Totten and Crossfield's purchase as is comprised within the route adopted by plaintiff over said township as shown on the maps filed by plaintiff in the said counties except such conveyance be expressly made and received subject to the rights of

way thereover of the plaintiff's said route and requiring the defendants to show cause at special term of this court to be held at the court-house in the village of Plattsburgh, N. Y., on the 4th day of October, 1897, why the injunction so granted should not be continued during the pendency of this action, in and by which order the plaintiff was authorized to make use of additional affidavits in support of said injunction, provided the same were served on the attorneys for the defendants appearing on or before October 6th, 1897, and the hearing on said order to show cause having been by stipulation adjourned to this day and the same having, pursuant thereto, come on to be heard and the plaintiff filing proof of service of said injunction and order to show cause on all of the defendants, together with proof of service of additional affidavits in support of said injunction served on Eugene L. Ashley, the only attorney appearing for the defendants herein, on reading and filing said original papers and the additional affidavits of David Willcox and Charles B. Hibbard in support of said injunction, and the affidavit of Eugene L. Ashley in opposition thereto, after hearing Lewis E. Carr, attorney for the plaintiff, in support of said injunction and for the continuance thereof, and Stephen Brown, of counsel for the defendant, in opposition thereto, and it appearing that an application for the vacation of such injunction upon the papers on which it was granted was made to the justice granting the same and denied, and it further appearing that the affidavit in opposition to
37 said injunction does not change in any material respect the questions presented, it is now, on motion of Lewis E. Carr, attorney for the plaintiff,

Ordered that said injunction be and the same hereby is continued during the pendency of this action, and until the further order of the court in the premises.

Enter in Essex county.

S. A. KELLOGG,
Jus. Sup. Ct.

Supreme Court.

ADIRONDACK RAILWAY COMPANY
against
INDIAN RIVER COMPANY and Others.

SIRS: Take notice that all of the defendants appeal to the appellate division of the supreme court for the third department from the order made herein sixteenth October, 1897, and from the whole thereof.

Very truly,

EUGENE L. ASHLEY,
S. AND L. M. BROWN,
Attorneys for the Defendants.

22 October, 1897.

To Lewis E. Carr, Esq., plaintiff's attorney, and the clerk of Essex county.

38 COUNTY OF ESSEX, } ss.:
Clerk's Office, }

Supreme Court.

ADIRONDACK RAILWAY COMPANY
against
INDIAN RIVER COMPANY and Others.

I, A. S. Prime, clerk of the county of Essex and also of the supreme court for that county, do certify that the annexed are copies of the order made in the above action, at a special term held at Plattsburgh, on the sixteenth of October, 1897, and entered in Essex county on the 25th of October, 1897, and of the papers on which the same was made and the notice of appeal from the same, on file in this office. In witness whereof I have hereunto set my hand and the seal of the county of Essex, this twenty-third day of November, 1897.

[SEAL.]

A. S. PRIME, *Clerk*,
By V. W. PRIME, *Deputy*.

SCHENECTADY, ss.:

Edward Winslow Paige, being duly sworn, says that as he is informed and believes Mr. Justice Kellogg made no written opinion, but that on an application to Mr. Justice McLaughlin to vacate the injunction on the papers on which it was granted, the latter justice delivered an opinion of which the annexed is a copy.

EDWARD WINSLOW PAIGE.

Sworn before me this 22d November, 1897.

EDWARD D. PALMER,
Notary Public.

39 Supreme Court.

THE ADIRONDACK RAILWAY COMPANY
ag'st
THE INDIAN RIVER COMPANY and Others.

Motion to vacate injunction pending an order to show cause why it should not be continued during the pendency of the action, and heard by Mr. Justice McLaughlin at the request of and for the convenience of counsel, at the Hotel Manhattan, in the city of New York, on the 4th day of October, 1897.

Mr. E. T. Brackett and Mr. E. L. Ashley appeared as counsel for the Indian River Company.

Mr. William McEchron and Mr. E. L. Ashley appeared in favor of the motion.

Mr. Stephen Brown also appeared as counsel for the Indian River Company, in favor of the motion.

Mr. G. D. Hasbrouck appeared on behalf of the State, especially for the purpose of being heard on the question of dissolving the injunction.

Mr. Lewis E. Carr and Mr. R. Burnham Moffat appeared as counsel for the plaintiff in opposition to the motion.

The plaintiff objected to any one appearing or being heard unless they were parties to or had an interest in the subject-matter of the action.

Mr. Brackett said: On behalf of the persons for whom I appear as counsel, I shall welcome assistance from the State, the forest preserve board, or from any other source. I differ from the attorney general that this is a proceeding upon notice, or that any one is entitled to be heard except counsel representing parties to or having an interest in the subject-matter of the action. The application is an *ex parte* one to dissolve an injunction granted *ex parte*, made upon the papers upon which it was originally granted, and to the judge who granted it. And while I have no wish other than the motion should be presented in an orderly manner, I think that the deputy attorney general, Mr. Hasbrouck, should be permitted to state the case and join in the request for dissolution if he sees fit to do so.

The objection to the deputy attorney general, Mr. Hasbrouck, appearing, was overruled, and he was permitted to be heard.

In deciding the matter Mr. Justice McLaughlin said: "The statute confers upon a railroad corporation the power to exercise the right of eminent domain. The plaintiff in pursuance of this power has attempted to exercise this right by taking the first steps toward the purchase or condemnation of the land in question. On the 18th day of September, 1897, it filed a map and profile of the routes adopted by it in the counties of Essex, Warren and Hamilton, where the lands are situate, and on the 23d of the same month it served upon all the owners of the lands except one the time when and the place where such plans and profile were filed.

Under the terms of the statute the plaintiff can take no further steps to acquire the fee to the route in question until after the expiration of fifteen days from the time this notice was given. This time, the fifteen days, is given to the owners for the purpose of enabling them to point out a different route than the one selected by the corporation. The fifteen days have not yet expired, and pending their expiration the plaintiff charges that the defendants have threatened and intend to prevent its taking the lands by deeding them to the State; and the plaintiff has brought this action to restrain them from so doing. The complaint specifically charges that the defendants, with the wrongful intention of depriving and barring the plaintiff of its statutory right to acquire the necessary right of way over the lands referred to, have threatened to and are forthwith about to convey absolutely to the forest preserve board, for the State, the lands referred to, and that such conveyance is made for the purpose of depriving the plaintiff of its right
41 to construct its road across their lands. Upon this complaint and the affidavit attached to it the injunction here sought to be vacated was granted; and the court is now asked to vacate it upon the same papers, upon the ground that the plaintiff was not,

and is not now, entitled to enjoin the defendants from doing what it is alleged they are about to do.

It must be assumed, therefore, for the purpose of this motion, that all the allegations of the complaint are true. Assuming them all to be true, I think a proper case is presented for the interference of a court of equity. The initial steps have been taken by the plaintiff to acquire the right of way across the defendants' lands, either by purchase or condemnation proceedings. The statute prevents the plaintiff doing anything further until after the expiration of fifteen days. The delay of fifteen days, which the plaintiff is subjected to, is solely for the benefit of land-owners. It seems to me it was the intention of the legislature that, after the plaintiff has taken the initiatory steps under the statute referred to, by filing its map and profile and giving the notice required, it should have intermediate the giving of the notice and the expiration of the fifteen days a right to the route which is impressed upon or attached to the land; something in the nature of an equitable lien, which the court should protect. To give this statute any other construction is to hold that the owners of the land have the power during the fifteen days accorded to them to point out another route, to repeal the statute itself. No such intention can be imputed to the legislature. The right to locate its line of road is delegated to the corporation by the legislature, and this right carries with it, or confers upon it, a further or subsequent right to condemn the land if needed for the road. When, therefore, the plaintiff made and filed its map indicating the route it intended to adopt for the construction of its road, gave the required notice, that moment it so far acquired a right to thereafter construct and operate a road upon that line unless changed by the land-owners, that it cannot be deprived of it during the fifteen days accorded to the owners to point out another way.

42 While it cannot be said that the plaintiff has as yet acquired any interest in the land itself, yet it certainly has acquired something in the nature of a right which by its hereafter complying with the terms and provisions of the statute may ripen into a title. The right which it now has, whatever it may be called, cannot be taken from it by the owners of the land so long as the statute which gives it a right to condemn land remains in force.

For these reasons I think the application to vacate the injunction should be denied.

"B."

(Here follows a copy of the certificate of condemnation. Same introduced in evidence as Plaintiff's Exhibit 11, below.)

"C."

Law office of Ashley & Williams, Glens Falls, N. Y.

Eugene L. Ashley, Henry W. Williams, and Albert N. C. Fowler.

Nov. 29TH, 1897.

Hon. J. P. Allds, forest preserve board, Albany, N. Y.

DEAR SIR: Enclosed herewith I hand you a copy of a letter which I received from Mr. Lewis E. Carr together with a copy of my reply. Both of which have been submitted to Judge Brown. While we are both willing that our name should be used in prosecuting the appeal in this proceeding, yet, we are not willing that our names should be used in any manner unprofessional, or in any way that will bring upon us reproach in matters of practice.

If there has been any sharp practice or any underhanded dealings with Mr. Carr in any proceedings bearing our name or in which we are interested, it will have to be righted by those who have been instrumental in doing the things complained of, or
43 we shall take the matter of so doing in our own hands.

While our clients are willing, and in fact anxious to do all they can to serve the needs of the forest preserve board, and the State, literally in accordance with the understanding which was had at the time the matters were closed up, yet, I am not willing that anybody should practice law in my name in any unprofessional or underhanded manner, and so far as I represent the clients which I do I shall right all wrongs which are perpetrated in my name and I shall not be a party to anything that is not strictly professional and above reproach in every respect.

Mr. Carr asks for a postponement of the case until next term because of professional engagements and I think, under the circumstances, it should be granted.

Yours truly, EUGENE L. ASHLEY.

Law office of Ashley & Williams, Glens Falls, N. Y.

Eugene L. Ashley, Henry W. Williams, Albert N. C. Fowler.

(Dictated E. L. A.) Nov. 29TH, 1897.

Hon. J. P. Allds, Albany, N. Y.

DEAR SIR: Since writing you this morning I have conferred with Judge Brown on the subject of Mr. Carr's letter,—Mr. Carr having written to Judge Brown on the same subject,—and it seems to us that, under the circumstances, we should stipulate to let these cases go to the next term, we see no reason why we should not do so, and Judge Brown is quite decided in his views on the subject as well as myself. We believe in being strictly professional and courteous in our practice, and recognizing the engagements of a busy man, we get in the hole some time ourselves, but we expect to prac-
44 tice law for some time to come and will be continuously meeting Mr. Carr.

We do not know why we should treat him differently in this case than we should in any other. I trust you will agree with me on the subject, and consent that this case go over the term without further discussion.

Yours truly, EUGENE L. ASHLEY.

(Enclosures.)

P. S.—You will remember Mr. Carr's courtesy to us when we asked for a postponement of the proceedings which he had noticed at Caldwell, and it occurs to me that we should extend to him the same courtesy now which he then extended to us.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *against* ADIRONDACK RAILWAY COMPANY, INDIAN River Company, William McEchron, Phœbe A. Hitchcock, Jeremiah W. Finch, Daniel J. Finch, Eugene L. Ashley, and John McGinn.	Answer of Defendant Adirondack Railway Company.

The Adirondack Railway Company, one of the defendants above named, answering the complaint herein by Lewis E. Carr, its attorney:

First. Admits that township number fifteen and township
45 number thirty-two of Totten and Crossfield's purchase lie wholly within the bounds of the forest preserve and also of the Adirondack park.

Second. Admits, upon information and belief, that on or about the 6th day of August, 1897, the forest preserve board adopted and had entered upon its minutes a resolution in the words and figures set forth in said complaint; and said defendant denies all knowledge or information sufficient to form a belief as to any offer having been made in the month of May, 1897, by the defendants Ashley and McEchron to the forest preserve board to sell to the plaintiffs for the sum of one hundred and forty-nine thousand dollars township number fifteen, and about eighteen thousand acres of township number thirty-two of Totten and Crossfield's purchase, or as to any such offer, if made, having been accepted by the forest preserve board on the sixth day of August, 1897.

Third. Admits, upon information and belief, that the defendants, Ashley and McEchron, on the 6th day of August, 1897, did not own all of the lands referred to in said resolution of the forest preserve board, and admits upon information and belief that subsequently to said date they associated with themselves the other defendants herein, who are human beings, and together with them formed defendant Indian River Company, a corporation organized and existing under the laws of *of* New York, and that said defendants subsequently executed and delivered to said Indian River Company divers deeds purporting to convey title to said lands to said Indian

River Company; but this defendant denies that the title to all of the above lands was conveyed to or vested in said Indian River Company, or that the deeds referred to were delivered to said Indian River Company until long after this defendant had secured a lawful right to construct the line of its railway across said township fifteen.

Fourth. Admits, upon information and belief, that the
46 Indian River Company prepared a deed to the plaintiffs of the lands referred to in said resolution of the forest preserve board, and was about to deliver the same when its delivery was stopped by the injunction hereinafter mentioned. And this defendant avers upon information and belief that at the time of the preparation of said deed and the service of said injunction the Indian River Company was not vested with the title to all of said lands.

Fifth. Admits that the defendant Adirondack Railway Company claims to be and avers that it is a railroad corporation organized and existing under the laws of the State of New York, and that on the 18th day of September, 1897, it filed in the offices of the clerks of Warren, Hamilton and Essex counties, respectively, a map and profile for an extension of its railroad across said township fifteen, and that on the 30th day of September, 1897, it brought an action against the other defendants herein, a copy of the summons and complaint in which action *are* contained in the papers annexed to the complaint herein marked "A;" and that upon the summons and complaint and the affidavits of Lewis E. Carr and Charles B. Hibbard, whereof also copies are contained in said papers marked "A," it obtained the injunction order, whereof a copy is contained in said papers marked "A," and that such further proceedings were had as are shown in said papers marked "A," that the injunction was continued *pendente lite* by the order, whereof a copy is also contained in said papers marked "A."

Sixth. Admits, upon information and belief, that on the 6th day of October, 1897, the Indian River Company deeded to the plaintiffs the lands referred to in said resolution of the forest preserve board, excepting those described in the maps and profiles so filed by this defendant for an extension of its railroad across said township fifteen as aforesaid, and denies all knowledge or information sufficient to form a belief as to whether on said 6th day of October, 1897, a
47 deed of the lands described in said maps and profiles was placed in escrow to be delivered when the injunction should be dissolved.

Seventh. Denies that on the 6th day of October, 1897, the State engineer and surveyor and the members of the forest preserve board signed a paper, a copy of which is annexed to said complaint and marked "B," and denies that any paper signed by the forest preserve board, of which a copy is annexed to said complaint and marked "B," was filed in the office of the secretary of state on said 6th day of October, 1897, or that a notice of said filing and the date of the filing of the description contained in said paper "B," which notice contained the same description of the real property which is con-

tained in paper "B," was served upon the Indian River Company on the 6th day of October, 1897.

Eighth. Admits, upon information and belief, that on the eleventh day of November, 1897, the forest preserve board and the comptroller, paid to the Indian River Company the sum of $99,000, and denies all knowledge or information sufficient to form a belief as to whether said money was the full sum of the purchase-money under any contract, and denies all knowledge or information sufficient to form a belief as to whether the plaintiffs, through their said State engineer or surveyor and forest force, entered into possession of said lands.

Ninth. Admits that the Adirondack Railway Company, prior to the eleventh of November, 1897, to wit, on the 7th day of October, 1897, proceeded against the other defendants herein to condemn the land described in said maps and profiles so filed as aforesaid, and admits that on the thirtieth day of November, 1897, those proceedings stood to be heard on the 21st day of December, 1897; and this defendant denies that said proceedings were begun only on said 7th day of October, 1897, or that at the time of the verification of the complaint herein, they stood to be heard on the 21st day of December, 1897.

48 Tenth. Denies all knowledge or information sufficient to form a belief as to any "arrangement spoken of in paper 'C'" annexed to said complaint, and admits that the appeal referred to in papers "A" annexed to said complaint was taken, noticed to be heard by the appellate division of the court for the 2nd of December, 1897, and was the first case on the calendar for that day.

Eleventh. Admits upon information and belief that on the thirtieth day of November, 1897, the defendant Ashley signed and sent to the Honorable J. P. Allds, papers, of which copies are annexed to said complaint marked "C," and on the first of December, 1897, he, being the attorney of record for The Indian River Company and others of the defendants in said action, stipulated the appeal over the term; and this defendant denies that the papers annexed to said complaint and marked "C" are all the papers that were sent by said defendant Ashley to the Honorable J. P. Allds in connection with the matter therein referred to, and begs leave to refer to the other papers exchanged between said parties, whereof said papers annexed to the complaint and marked "C" are but a part, as the same may be produced upon the trial hereof.

Twelfth. Admits that on the 14th day of January, 1898, the said appeal was heard by the appellate division, and that the case was decided by said appellate division on the second day of March, 1898. It avers that on said day an opinion was handed down by said appellate division to the effect that the order continuing the injunction should be reversed and the injunction should be dissolved, but it avers upon information and belief that no order of the court reversing said order and dissolving said injunction has ever yet been made or entered; and it denies all knowledge or information sufficient to form a belief as to whether upon the handing down of said

opinion of the appellate division or otherwise, any deed there-
49 tofore placed in escrow was delivered to the people of the State of New York or has since been recorded.

Thirteenth. Admits that the defendant The Adirondack Railway Company was at the time of the verification of the complaint herein proceeding with its condemnation proceedings against the other defendants, and had obtained in each proceeding a judgment against said defendants, which among other things provided for the appointment of commissioners.

Fourteenth. Denies that the other defendants had made substantially no defense in said proceedings, and denies upon information and belief that the other defendants had not informed the forest preserve board or any member of the State government of the fact that such proceedings were continuing; and it admits that the defendant, The Adirondack Railway Company, intended to continue said proceedings with a view of acquiring title thereby to that portion of township fifteen described in said maps and profiles so filed as aforesaid.

And further answering, and for a second and separate defense to the alleged cause of action set forth in the complaint herein, this defendant further shows:

Fifteenth. That the defendant The Adirondack Railway Company, with the intent of exercising its vested right to acquire by eminent domain a right of way for its line across township fifteen of Totten and Crossfield's purchase, did on the 18th day of September, 1897, cause to be filed in the respective offices of the clerks of the counties of Warren, Hamilton and Essex a map and profile of the route adopted by it across said township in each of said counties, and on and prior to September 23d, 1897, had caused to be served a notice of the filing of said maps and profiles on each of the other defendants herein excepting the defendant Jeremiah W. Finch, who was served on October 1st, 1897, all of said other defendants being
or claiming to be the owners of said lands, which were wild
50 forest lands and without actual occupants within the meaning of the statute.

That by the provisions of the statute authorizing the defendant The Adirondack Railway Company to exercise its said right of eminent domain, said defendant was prevented from doing anything further in the exercise of such vested right until after the expiration of fifteen days from and after the giving of written notice to all actual occupants of said lands of the time and place at which said maps and profiles were filed.

Sixteenth. That no notice having been given to the defendant The Adirondack Railway Company of any application for the appointment of commissioners to examine said route, and no such application having in fact been made, said defendant company did on the 7th day of October, 1897, continue the statutory proceedings theretofore commenced by it to acquire by eminent domain its right of way across said township fifteen, by serving upon one or more of the owners of said lands a petition for the condemnation thereof together with a notice of the time and place of presentation of said

petition, and subsequently to said service, but on the same day, filing and recording in the offices of the clerks of Warren, Hamilton and Essex counties, respectively, a notice of the pendency of said proceedings, stating the names of the parties and the object of said proceedings and containing a description of the property affected thereby, which said notices were forthwith indexed against the name of each of the defendants in said proceedings, including the Indian River Company; and that said notice of the pendency of said proceedings was filed and recorded in the office of the clerk of Warren county and indexed against all of said defendants, including said Indian River Company, prior to the serving upon the Indian River Company or upon any other of the owners of said real property of any notice of the filing or of the date of filing of the description of the lands sought to be appropriated by the plaintiffs as alleged in the complaint herein.

51 Seventeenth. That no notice of the filing and of the date of filing of the description of said real property so sought to be appropriated has ever been served upon the defendant, The Adirondack Railway Company.

Eighteenth. That such proceedings were had in said statutory proceedings so commenced by the defendant Adirondack Railway Company in each of said counties of Warren, Hamilton and Essex, as aforesaid, to acquire by the exercise of its right of eminent domain a right of way for its railroad across said township fifteen, that at a special term of the supreme court in and for the fourth judicial district, held at the county court house in the village of Plattsburgh on the 12th day of March, 1898, it was in each of said proceedings on the appearance of the Adirondack Railway Company and of all of the defendants to said proceedings, and upon proof duly made, among other things, adjudged and decreed that said Adirondack Railway Company was entitled to the relief demanded in its said petition and that the condemnation of the real property described in said petition was necessary for the public use and that said Adirondack Railway Company was entitled to take and hold said property for the public use specified in its said petition, to wit, the construction, operation and maintenance of its line of railway across said township fifteen, upon making compensation therefor; and in and by said judgment, commissioners were duly appointed by the court to ascertain the compensation to be made to the owners of said property so taken for said public use.

Nineteenth. Upon information and belief, that the plaintiffs herein, represented by said forest preserve board, had full notice of said proceedings from the commencement to the end thereof and were given by the respective attorneys for the defendants therein, the full and entire control of the defense of said proceedings, and that said plaintiffs, through J. P. Allds, the attorney for said forest preserve board, did participate in and did control the

52 conduct of such defense on their own behalf and for their own benefit, although in the names of the Indian River Company and of the other defendants of record therein who at the time of the commencement of said proceedings and prior to the

delivery by them to said plaintiffs of any deed thereto, had been and were the owners of said land; and that said plaintiffs having had their day in court in said proceedings and having had full opportunity to participate in and to control the defense thereof and having actually taken part in and controlled said defense, are concluded by the judgments so rendered as aforesaid in each of said proceedings.

And further answering and for a third and separate defense to the alleged cause of action set forth in the complaint herein, this defendant further shows:

Twentieth. That the title to the lands in township fifteen described in the maps and profiles so filed as aforesaid in the offices of the clerks of Warren, Hamilton and Essex counties, respectively, is claimed by the plaintiffs herein to have been acquired under and by virtue of the proceedings taken by the forest preserve board pursuant to authority claimed and pretended to have been conferred upon it so to acquire said lands by sections two, three, and four of chapter two hundred and twenty of the Laws of 1897 of the State of New York.

Twenty-first. Upon information and belief, that said sections, and particularly section four of said chapter 220 of said Laws of 1897, and the enactment thereof, were and are in direct violation of section one of article one of the constitution of the State of New York, which provides that no member of this State shall be deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers; and are also in direct violation of section six of article one of the constitution of the State of New York, which provides that no person shall be deprived of life, liberty or property without due process of law,
53 and that private property shall not be taken for public use without just compensation, and that said sections and their enactment at no time conferred any legal authority upon the plaintiffs or upon their representatives to enter upon or take possession of the lands hereinbefore referred to, and that the plaintiffs herein never acquired and have not now any title to or property whatever in said lands.

And further answering for a fourth and separate defense to the alleged cause of action set forth in the complaint herein, this defendant reiterating each and every allegation contained in the paragraph of this answer marked "Twentieth," as if the same were here again set forth at length, further shows:

Twenty-second. Upon information and belief that said sections and particularly sections three and four of said chapter 220 of said Laws of 1897, and the enactment thereof, were and are in direct violation of section seventeen of article three of the constitution of the State of New York, which provides that no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act, and that said sections and their enactment at no time conferred any legal authority upon the plaintiffs

or upon their representatives to enter upon or take possession of the lands hereinbefore referred to, and that the plaintiffs herein never acquired and have not now any title to or property whatever in said lands.

And further answering and for a fifth and separate defense to the alleged cause of action set forth in the complaint herein, this defendant reiterating each and every allegation contained in the paragraph of the answer marked "Twentieth," as if the same were here again set forth at length, further shows:

Twenty-third. Upon information and belief, that said sections and particularly section four of said chapter 220 of said Laws
54 of 1897, and the enactment thereof were and are in direct violation of section one of the fourteenth amendment to the Constitution of the United States of America which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no State shall deprive any person of life, liberty or property without due process of law, and shall not deny to any person within its jurisdiction the equal protection of the laws, and that said sections and their enactment at no time conferred any legal authority upon the plaintiffs or upon their representatives to enter upon or take possession of the lands hereinbefore referred to, and that the plaintiffs herein never acquired and have not now any title to or property whatever in said lands.

And further answering and for a sixth and separate defense to the alleged cause of action set forth in the complaint herein, this defendant reiterating each and every allegation contained in the paragraph of this answer marked "Twentieth," as if the same were here again set forth at length, further shows:

Twenty-fourth. Upon information and belief that said sections, and particularly section four of said chapter 220 of said Laws of 1897, and the enactment thereof, were and are in direct violation of section ten of article 1, of the Constitution of the United States of America, which provides that no State shall pass any law impairing the obligation of contracts, and that said sections and their enactment at no time conferred any legal authority upon the plaintiffs or upon their representatives to enter upon or take possession of the lands hereinbefore referred to, and that the plaintiffs herein never acquired and have not now any title to or property whatever in said lands.

Wherefore this defendant prays judgment that the complaint be dismissed with costs.

LEWIS E. CARR,
Attorney for Defendant, Adirondack Railway Company,
56 North Pearl Street, Albany, N. Y.

55 CITY AND COUNTY OF NEW YORK, *ss:*

Chas. A. Walker, being duly sworn, says:

I am secretary and treasurer of the Adirondack Railway Company, the defendant above named.

I have read the foregoing answer, and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is made by me and not made by said defendant is that said defendant is a corporation.

The sources of my information and the ground of my belief as to all matters not stated to be alleged upon my own knowledge are information afforded me by the counsel for said company.

CHAS. A. WALKER.

Sworn to before me this 3d day of June, 1898.

FRANK WALLING,
Notary Public, N. Y. Co.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE ADIRONDACK RAILWAY COMPANY and Others. } Decision.

56 I, Alden Chester, having heard the proofs and allegations of the parties upon the issues raised by the answer of the Adirondack Railway Company to the complaint, which issues were tried without a jury at a special term held by me in the county of Albany, do,

Decide that the People of the State of New York are entitled to the relief demanded in the complaint.

The grounds of this decision are that the People of the State of New York having become the owners in fee of the township fifteen described in the complaint, which township is within the bounds of the forest preserve and of the Adirondack park, the Adirondack Railway Company has acquired no rights which it can assert against the State.

And I direct judgment that it be perpetually enjoined from prosecuting either of the proceedings described in the complaint and any proceeding to take any part of, or any interest in, the said township fifteen, and from permitting any such proceeding to proceed in its name or behalf, and for costs.

Twenty-ninth of October, 1898.

ALDEN CHESTER,
Justice Supreme Court.

57 At a special term of the supreme court, held at the city hall in the city of Albany, N. Y., on the 5th day of November, 1898.

Present: Hon. Alden Chester, justice.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs, *against* ADIRONDACK RAILWAY COMPANY, INDIAN RIVER COMPANY, WILLIAM McECHRON, PHŒBE A. HITCHCOCK, JEREMIAH W. FINCH, DANIEL J. FINCH, EUGENE L. ASHLEY, and JOHN McGINN, Defendants.	Judgment. Nov. 7th, 1898, 1 p. m

The issues in the above-entitled action made by the answer of the defendant Adirondack Railway Company to the complaint, having been tried by the court without a jury, and the court having made and filed its written decision whereby it directs judgment in favor of the plaintiffs for the relief demanded in the complaint, and it appearing to the court that the summons and complaint have been served upon all the defendants more than 20 days since, and that no answer or demurrer has been received from either of the defendants, except the Adirondack Railway Company, and that none of the defendants, except Adirondack Railway Company has appeared in the action, it is now, on motion of the attorney general—

Adjudged, that township fifteen, of Totten and Crossfield purchase, situated in Hamilton, Warren and Essex counties, and
58 described in the complaint herein is the property of the People of the State of New York, and is situated within the Adirondack park and the forest preserve.

And it is further adjudged that the defendants, and each of them, their agents and servants, be and they are perpetually enjoined from further continuing any of the condemnation proceedings described in the complaint herein, and from beginning or continuing any condemnation proceedings to take any part of, or interest in any part of, said township fifteen, and from suffering any such proceedings to be begun, proceeded with or continued in their or either of their names or behalf, and that the people of the State of New York recover of the defendant Adirondack Railway Company one hundred and fifty dollars costs herein.

Enter.

ALDEN CHESTER,
Justice Supreme Court.

JAMES M. BORTHWICK, *Clerk.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE ADIRONDACK RAILWAY COMPANY and Others. } Opinion at Special Term.

CHESTER, *J.*:

The State by this action seeks to enjoin the defendant, The Adirondack Railway Company, from taking or continuing condemnation proceedings to procure a right of way for a railroad
59 across what is known as township 15, which lies in the counties of Warren, Essex and Hamilton and which is wholly within the Adirondack park and is a part of the forest preserve.

While the State was conducting negotiations for the purchase of township 15 this railway company procured from the special term an injunction restraining the owners of the township from conveying it to the State, except subject to the right of way claimed by the company. This claim was based upon the filing by the company on September 18, 1897, of a map and profile of its proposed right of way over such township in the clerk's offices in the counties of Warren, Essex and Hamilton, under section 6 of the railroad law and the service of notices upon the property-owners. From an order continuing that injunction during pendency of the action, an appeal was taken to the appellate division in the third department where the order was reversed and the injunction vacated.

Adirondack Railway Co. *v.* Indian River Co. (27 App. Div., 326).

It is urged by the plaintiff here that the appellate division decided in that case that the railway company had no rights under the privilege granted to it to condemn land for railroad purposes, and had acquired none that it could assert against the State, and that any rights or privileges the railway company had under the power of eminent domain were taken subject and subordinate to the right of the State to exercise that power in its own immediate behalf. (*Id.*, page 335.)

The defendant insists, however, that three of the justices did not concur in this conclusion, and therefore that it is not controlling upon the trial before me.

Two propositions are discussed in the opinion, which was written by Mr. Justice Herrick: first, the one above stated, and second, that if the railway company was right in its contention that it had acquired a right of way over this township it did not need any
60 injunction, for any conveyance to the State would have to be subject to that right.

In the concluding sentence of the opinion the learned justice says: "I am of the opinion, therefore, that, because in one aspect of the case an injunction is not needed to protect the plaintiff's claim of right, and in another aspect of the case it is a practical interference with, restraint upon, and obstruction to, the exercise by the State of its power of eminent domain, the injunction should be vacated and

set aside." It will be observed that in this concluding sentence the two propositions are mentioned in the reverse order of their discussion in the opinion.

The concurrence of the other justices is in this language: "All concurred; Parker, P. J., Landon and Merwin, J. J., upon grounds last stated in opinion."

From this statement of grounds of concurrence the conflict before me as to what was decided has arisen, the plaintiff claiming that it was the proposition first discussed in the opinion and mentioned last in the concluding sentence, and the defendant that it was directly the converse.

It is my belief that the concurrence was upon the ground that the injunction was not needed to protect the plaintiff's claim of right instead of on the ground last mentioned in the concluding sentence, yet there was no recorded dissent from the opinion of Justice Herrick and his reasoning, in discussing the first proposition, is so clear and convincing that I am led to agree with the conclusion he arrived at with respect to that question, regardless of whether or not it was concurred in by two other justices, and to hold here that the defendant company has acquired no rights under the condemnation law which it can assert as against the State.

The facts upon which the opinion written at the appellate division is founded are fully stated in the report of that case and need
61 not be repeated here, nor need I attempt to add anything to the reasoning leading to the conclusion above expressed.

See Adirondack Railway Co. *v.* Ind. River Co., *supra*.

The facts arising since the granting of the injunction which was vacated do not in my opinion furnish any material aid in support of the contention of the railway company. The owners were about to convey township 15 to the State when, on October 1, 1897, they were prevented from so doing by the injunction. They thereupon put the deed of the township in escrow to be delivered when the injunction was dissolved, and made and delivered another deed excepting the strip of land described in the railway survey. The deed in escrow was delivered March 2, 1898, after the dissolution of the injunction. On the 7th day of October, 1897, the State caused a notice, under section 4, of chapter 220, Laws 1897, to be served upon the owners of the strip of land described in the railroad map, and from that time it is insisted by the plaintiff that such land became the property of the State by appropriation in the exercise of its right of eminent domain under that law. On the same day the railway company began condemnation proceedings under the railroad law to take the strip of land in question. In the proceedings commenced by the railway company, in a single day (March 12, 1898) an order of reference to hear and determine was made, a trial before the referee had, a decision made and a judgment procured that the railway company is entitled to take the strip of land for its use upon making compensation therefor, and appointing three commissioners to ascertain the compensation to be made to the owners. The State was not a party to these proceedings.

Each side claims precedence over the other in commencing their respective condemnation proceedings, and the railway company attacks the constitutionality of the provisions of chap. 220, Laws 1897, so far as that act permits the condemnation of lands
62 for public use by the method pursued by the State in this case. From the view I take of the case as above expressed, it is unnecessary for me to determine these questions.

Under the condemnation proceedings taken by the railway company, the title of the lands sought to be taken does not pass upon the procuring of a judgment of condemnation, nor does it pass until the amount of compensation has been determined and actually paid to the owners.

Code Civil Procedure, §§ 3371 and 3373.

The compensation not having been determined and paid, the title or right of the railway company, if any, is the same now as when the appellate division vacated the injunction.

In the meantime the State has procured the legal title by the delivery of the deeds herein mentioned, regardless of the question whether or not the alleged condemnation by the State was effective to appropriate the land as the property of the State under the law, the constitutionality of which is here questioned.

I am aware that in the opinion written by Justice Herrick in the case at the appellate division, mention is made of the relative rights of the parties with reference to taking the property under the power of eminent domain, the one under the condemnation law and the other under the forest preserve act (ch. 220, Laws 1897), and that the question of the constitutionality of the exercise by the State of the power to appropriate land by the method provided in the latter act is not passed upon in that opinion. That act, however, provides not only for a method of appropriation by the State, but authorizes the forest preserve board to acquire land for the State by "purchase or otherwise" (§ 2).

In this case the State has not only acquired the land by agreement with and deed from the owners, but has pursued the method provided by the statute for a condemnation or appropriation of it, and I think the conclusion reached in the opinion referred to
63 as — the superior right of the State is equally well founded, regardless of by which of these two methods the State procured title. If I am right in this, a determination of the constitutionality of the act authorizing the State to pursue the method of condemnation it did is not essential to a decision of the case for the State may rely alone upon its title by deed.

The State having acquired the lands, they are now part of the forest preserve, and are brought within the protection of section seven of article seven of the constitution, which provides that: "The lands of the State, now owned or hereafter acquired, constituting the forest preserve, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, nor shall the timber thereon be sold, removed or destroyed."

These lands are not therefore subject to be taken by this railway

company, and the plaintiff is entitled to the relief demanded in the complaint, with costs.

Supreme Court, County of Albany.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE ADIRONDACK RAILWAY COMPANY and Others. } Notice of Exceptions.

The defendant, The Adirondack Railway Company, hereby excepts to the decision of Mr. Justice Chester, dated October 29th, 1898, and filed in the office of the clerk of the county of Albany, on November 3, 1898, as follows:

It excepts to the decision of the said justice that the People of the State of New York are entitled to the relief demanded in the complaint.

64 It excepts to the decision of said justice in so far as he decides as a matter of law that the People of the State of New York have become the owners in fee of the township fifteen described in the complaint, and that the Adirondack Railway Company has acquired no rights which it can assert against the State.

It excepts to the decision of said justice in so far as he decides that the plaintiff is entitled to judgment perpetually enjoining the Adirondack Railway Company from prosecuting either of the proceedings described in the complaint and any proceedings to take any part of or any interest of the said township fifteen, and from permitting any such proceeding to proceed in its name or behalf, and for costs.

Dated Albany, New York, November 5th, 1898.

LEWIS E. CARR,
Attorney for Defendant Adirondack Railway Company,
56 North Pearl Street, Albany, N. Y.

To Hon. T. E. Hancock, attorney general; James M. Borthwick, Esq., clerk, &c.

65 Supreme Court, County of Albany.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE ADIRONDACK RAILWAY COMPANY and Others. } Notice of Appeal to Appellate Division.

SIRS: You will please take notice that the defendant, The Adirondack Railway Company, hereby appeals to the appellate division of the supreme court in and for the third judicial department from

(S'g'd) L. E. C., T. E. H., by E. W. P.

the judgment entered herein in favor of plaintiff and against defendant on the 7th day of November, 1898, and from each and every part of said judgment.

Dated Albany, New York, November 7th, 1898.

Yours, &c.,
LEWIS E. CARR,
Attorney for Defendant Adirondack Railway Company,
56 North Pearl Street, Albany, N. Y.

To Hon. T. E. Hancock, attorney general; James M. Borthwick, Esq., clerk, etc.

66 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *against* ADIRONDACK RAILWAY COMPANY, INDIAN RIVER COMPANY, WILLIAM McECHRON, PHŒBE A. HITCHCOCK, JEREMIAH W. FINCH, DANIEL J. FINCH, EUGENE L. ASHLEY, and JOHN McGINN. } Case Containing Exceptions.

This action came on for trial before Honorable Alden Chester, one of the justices of this court, at a special term, held in the city of Albany, on the 12th day of July, 1898.

Edward Winslow Paige, Esq., and G. V. D. Hasbrouck, Esq., appeared for plaintiffs.

Lewis E. Carr, Esq., and R. Burnham Moffat, Esq., appeared for defendant Adirondack Railway Company.

None of the other defendants appeared.

Mr. Paige having opened the case for plaintiffs thereupon called—

JOTHAM P. ALLDS, who, being duly sworn as a witness for the plaintiffs, testified as follows:

Direct examination by Mr. PAIGE:

I reside at Norwich, New York, and am an attorney and counsellor-at-law. In the year 1897 I was from time to time counsel for the forest preserve board.

Plaintiffs' counsel offers in evidence the following papers:

67 Deed dated August 13th, 1897, from William McEchron and Sarah E., his wife, William E. Spier and Ida M., his wife, George F. Underwood and Jennie A., his wife, parties of the first part, to the Indian River Company, a domestic corporation organized under the laws of the State of New York, party of the second part. Consideration, $78,000. Conveys certain property in township 32 with stated exceptions. Covenant against grantor's acts. Acknowledged in Warren county September 2nd, 1897, and

recorded in the office of the clerk of Hamilton county on October 8th, 1897, at one o'clock p. m., in Liber 30 of Deeds.

Same received in evidence and marked Plaintiff's Exhibit 1.

Deed dated September 2nd, 1897, between the Glens Falls Paper Mill Company, a corporation organized under the laws of the State of New York, party of the first part, and the said Indian River Company, party of the second part. Consideration, $60,000. Conveys 24,000 acres, more or less, lying in township 15, Totten and Crossfield's purchase, and situated in Warren, Hamilton and Essex counties, being an undivided one-half part of said township. This deed conveys the same premises described in three certain deeds to the party of the first part, namely, one dated August 7th, 1897, from Eugene L. Ashley and wife conveying an undivided one-fourth of said township; one from Daniel J. Finch and wife, dated August 30th, 1897, conveying an undivided one-eighth of said township; and one from Phœbe A. Hitchcock, dated August 30th, 1897, conveying an undivided one-eighth of said township. Acknowledged in Warren county on September 2nd, 1897, and recorded in the office of the clerk of Essex county on the 8th day of October, 1897, at nine o'clock in the forenoon in Liber 114 of Deeds, and recorded in the office of the clerk of Hamilton county on the 8th of October, 1897, at one o'clock in the forenoon, in Liber 30 of Deeds.

Same received and marked Plaintiff's Exhibit 2.

68 Deed dated September 2nd, 1897, from Phœbe A. Hitchcock, party of the first part, to said The Glens Falls Paper Mill Company, party of the second part. Consideration $7,500. Conveys all the right, title and interest of the party of the first part in and to a tract of 4,000 acres, situated in township 15, Totten and Crossfield's purchase, and lying in Warren, Hamilton and Essex counties; deed intending to convey an undivided one-eighth part of said township. Acknowledged September 2nd, 1897, in Warren county, and recorded in the office of the clerk of Essex county on the 8th day of October, 1897, at nine o'clock in the forenoon in Liber 114 of Deeds; and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the forenoon in Liber 30 of Deeds.

Same received in evidence and marked Plaintiff's Exhibit 3.

Deed dated September 2nd, 1897, between Jeremiah W. Finch and Augusta his wife, parties of the first part, and said The Indian River Company, party of the second part. Consideration $30,000. Conveys all the right, title and interest of the parties of the first part in and to 24,000 acres of land lying in township 15, Totten and Crossfield's purchase, and situated in the counties of Warren, Hamilton and Essex, the deed intending to convey an undivided one-fourth part of said township. Acknowledged in Warren county September 2nd, 1897, and recorded in the office of the clerk of Essex county on October 8th, 1897, at nine o'clock in the forenoon in Liber 114 of Deeds; and recorded in the office of the clerk of

Hamilton county on October 8th, 1897, at one o'clock in the forenoon in Liber 30 of Deeds.

Same received and marked Plaintiff's Exhibit 4.

69 Deed dated September 2nd, 1897, between John McGinn and Margaret his wife, parties of the first part, and said The Indian River Company, party of the second part. Consideration $30,000. Conveys all the right, title and interest of the parties of the first part in and to 24,000 acres of land lying in township 15, Totten and Crossfield's purchase, and situated in the counties of Warren, Hamilton and Essex, the deed intending to convey an undivided one-fourth part of said township 15. Acknowledged in Hamilton county, September 2nd, 1897, and recorded in the office of the clerk of Essex county on the 8th day of October, 1897, at nine o'clock in the forenoon in Liber 114 of Deeds; and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the afternoon in Liber 30 of Deeds.

Same received in evidence and marked Plaintiff's Exhibit 5.

Deed dated September 2nd, 1897, between Eugene L. Ashley and Elizabeth H. his wife, parties of the first part, and said The Glens Falls Paper Mill Company, party of the second part. Consideration $15,000. Conveys all the right, title and interest of the parties of the first part in and to 24,000 acres of land lying in township 15, Totten and Crossfield's purchase, and situated in the counties of Warren, Hamilton and Essex, said deed intending to convey an undivided one-fourth part of said township 15. Acknowledged in Warren county September 1st, 1897, and recorded in the office of the clerk of Essex county on the 8th day of October, 1897, at nine o'clock in the forenoon, in Liber 114 of Deeds; and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the afternoon in Liber 30 of Deeds.

Same received in evidence and marked Plaintiff's Exhibit 6.

70 Satisfaction of mortgage dated September 2nd, 1897, signed by Jeremiah W. Finch and certifying that an indenture of mortgage bearing date November 1st, 1881, made and executed by John J. Finch and Clara B., his wife, to H. Crandall, and recorded in the office of the clerk of Hamilton county in Book No. 7 of Mortgages at page 129 on February 6th, 1882, is, with the bond accompanying it, fully paid and satisfied. Acknowledged in Warren county September 2nd, 1897, and recorded in the office of the clerk of Essex county on the 8th day of October, 1897, at nine o'clock in the forenoon in Liber 9 of Assignments and Satisfaction of Mortgages; and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the afternoon in Liber 13 of Mortgages.

Same received in evidence and marked Plaintiff's Exhibit 7.

Satisfaction of mortgage dated September 3rd, 1897, signed by Clayton W. Finch and Catharine A. Cool, certifying that a certain

indenture of mortgage bearing date May 1st, 1896, made and executed by Eugene L. Ashley to Clayton W. Finch and Catharine A. Cool and recorded in the office of the clerk of Warren county in Book 44 of Mortgages, page 382 on May 23rd, 1896; and recorded in the office of the clerk of Essex county in Book 54 of Mortgages at page 455 on March 27th, 1897; and recorded in the office of the clerk of Hamilton county in Book 12 of Mortgages at page 374 on June 9th, 1897, is, with the bond accompanying the same, fully paid and satisfied. Acknowledged in New York county September 3rd, 1897, and in Saratoga county September 8th, 1897, and recorded in the office of the clerk of Essex county on October 8th, 1897, at nine o'clock in the forenoon in Liber 9 of Assignments and Satisfactions; and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the afternoon in Liber 13 of Mortgages.

Same received in evidence and marked Plaintiff's Exhibit 8.

71 Satisfaction of mortgage dated September 2nd, 1897, and signed Finch & Co. by J. W. Finch, certifying that a certain indenture of mortgage bearing date April 1st, 1877, made and executed by John McGinn and wife to Henry Crandall, and recorded in the office of the clerk of Warren county in Book 10 of Mortgages at page 308 on August 8th, 1877, at nine o'clock in the forenoon, and in the office of the clerk of Hamilton county on September 11th, 1877, at six o'clock in the afternoon in Liber 6 of Mortgages at page 204; and recorded in the office of the clerk of Essex county on August 29th, 1877, at nine o'clock in the forenoon in Book 40 of Mortgages at page 311, which said mortgage was assigned by Henry Crandall to Finch & Co. by assignment dated August 1st, 1877, and recorded in Warren county clerk's office August 8th, 1877, in Book 10 of Mortgages at page 309, and recorded in Essex county clerk's office August 29th, 1877, in Book 1 of Satisfaction of Mortgages at page 533, and recorded in Hamilton county clerk's office September 11, 1877, in Book 6 of Mortgages at page 307, is, together with the bond accompanying the same, fully paid and satisfied. Acknowledged in Warren county September 2nd, 1897, and recorded in the office of the clerk of Essex county October 8th, 1897, at nine o'clock in the forenoon, in Liber 19 of Satisfactions, and recorded in the office of the clerk of Hamilton county on the 8th day of October, 1897, at one o'clock in the afternoon, in Liber 13 of Mortgages.

Same received in evidence and marked Plaintiff's Exhibit 9.

Deed dated September 2d, 1897, between Daniel J. Finch and Isabella, his wife, parties of the first part, and said The Glens Falls Paper Mill Company, party of the second part. Consideration $7,500. Conveys all the right, title and interest of the parties of the first part in and to 24,000 acres of land lying in township
72 15, Totten and Crossfield's purchase, and situate in the counties of Warren, Hamilton and Essex, this deed intending to convey an undivided one-eighth part of said township 15.

Acknowledged in Warren county September 2d, 1897, and recorded in the office of the clerk of Essex county October 8th, 1897, at nine o'clock in the forenoon, in Liber 114 of Deeds, and recorded in the office of the clerk of Hamilton county on October 8th, 1897, at one o'clock in the afternoon, in Liber 30 of Deeds.

Same received in evidence and marked Plaintiff's Exhibit 10.

Examination of witness continued:

Q. I show you Plaintiff's Exhibits 1 to 10 inclusive. Do you recognize these deeds?

A. I do. They were delivered to me the day of the meeting in September there.

Mr. CARR: I object to the witness using the word "delivered" except as it may mean a personal delivery to him.

(Witness continuing:)

Mr. Ashley gave them to me on that day and they were placed in a box labeled "township 15," and were there until the 7th day of October. They were given to me by Mr. Ashley on the 14th day of September, 1897.

Q. What was done with them then?

A. They were forwarded to the proper county clerk's offices for record.

Plaintiff's counsel offers in evidence certified copy of resolution of forest preserve board to condemn property.

Same received in evidence and marked Plaintiff's Exhibit 11, as follows:

OFFICE OF STATE ENGINEER AND SURVEYOR,
ALBANY, N. Y.

To the honorable forest preserve board:

73 In pursuance of your direction I transmit herewith the annexed description of the land embraced in your request of October 6th, 1897.

Respectfully yours,

C. W. ADAMS,
State Engineer and Surveyor.

Description.

Description of land in township 15, Totten and Crossfield's purchase, Hamilton, Essex, and Warren counties, New York, in the territory embraced in the Adirondack park which it is proposed shall be appropriated by the State of New York under and pursuant to an act of the legislature of the — New York, known as chap. 220 of the Laws of 1897.

All that certain tract or parcel of land situate lying and being in the counties of Hamilton, Essex and Warren and State of New York, and being a portion of township 15 Totten and Crossfield's purchase, and being a strip of land six (6) rods in width and being three (3)

rods in width upon each side of a centre line of a proposed route of the Adirondack Railway Company across said township as is shown upon three certain maps filed respectively in Hamilton, Essex and Warren counties, to which maps reference is hereby made for a more particular description.

The maps to which reference is hereby made being a map filed in the respective county clerk offices on September 18th, 1897, and which bears the endorsement "Adirondack Railway Company." Map showing proposed location through Hamilton county, N. Y., Warren county, Essex county, respectively, and each of which is certified by R. S. Grant, president, and P. H. Brown, chief engineer.

Said centre line commencing upon the south line of township 15 at the southwest corner of lot 149 and crossing lots 149, 140, 141, 134, 117, 116, 101, 100, 99, 98, 95, 74, 73, 72, 49, 50, 51, 46, 45, 28, 29, 30, 43, 42, 31, 18 and 17 and strikes the north line of township 15 near the centre of the north line of the northeast quarter of said lot 7; and being the said land excepted and reserved in a certain deed dated the second day of September, 1897, and acknowledged the seventh day of October, 1897, made and executed by the
74 Indian River Company to the People of the State of New York, the said lands so excepted and reserved being in the said deed described in words and figures following, to wit: "So much of that tract of land situated in Warren, Essex and Hamilton counties and known as part of township 15 of Totten and Crossfield purchase as is comprised within the route adopted by the Adirondack Railway Company over said township as shown by the map filed by the said Adirondack Railway Company in said counties."

STATE OF NEW YORK, } ss.:
County of Albany, City of Albany, }

I, Campbell W. Adams, State engineer and surveyor, of the State of New York, do hereby certify that the foregoing description of lands in township 15, Totten and Crossfield's purchase in Hamilton, Essex and Warren counties, State of New York, is an accurate description of the lands reserved in a certain deed from the Indian River Company to the State of New York which are to be appropriated by the State of New York acting by and under the authority of the forest preserve board pursuant to an act of the legislature of the State of New York, passed April 8th, 1897, entitled "An act to provide for the acquisition of lands in the territory embraced in the Adirondack park and making an appropriation therefor," and that the same is correct.

Dated October 7th, 1897.

CAMPBELL W. ADAMS,
State Engineer and Surveyor.

STATE OF NEW YORK, } ss.:
County of Albany, City of Albany, }

We, Timothy L. Woodruff, Charles H. Babcock and Campbell W. Adams, being the forest preserve board, acting under and in pur-

suance to an act of the legislature of the State of New York, being chap. 220 of the Laws of 1897, entitled "An act to provide for the acquisition of land in the territory embraced in the Adiron-
75 dack park, and making an appropriation therefor," do hereby certify that the lands in township 15, Totten and Crossfield's purchase in the counties of Hamilton, Essex and Warren, State of New York, described in the foregoing certificate of the State engineer, have been and hereby are duly appropriated by the State of New York for the purpose of making them a part of the Adirondack park.

Dated Albany, October 7th, 1897.

TIMOTHY L. WOODRUFF,
CHARLES H. BABCOCK,
CAMPBELL W. ADAMS,
Forest Preserve Board.

Endorsed: State engineer certificate & description & forest preserve board's certificate of condemnation. State of New York, office of secretary of state. Filed Oct. 7, 1897, a. m. Andrew Davidson, deputy secretary of state.

STATE OF NEW YORK,
Office of the Secretary of State, } *ss.:*

I have compared the preceding copy of certificate of description and certificate of condemnation with the original thereof remaining on file in this office and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the secretary
[SEAL.] of state, at the city of Albany, this twenty-second day of November, one thousand eight hundred and ninety-seven.

HORACE G. TENNANT,
Second Deputy Secretary of State.

76 Plaintiff's counsel offers in evidence notice of condemnation of property.

Same received in evidence and marked Plaintiff's Exhibit 12, as follows:

To the Indian River Company and to William McEchron as president thereof:

Take notice that on the 7th day of October 1897 there was filed in the office of the secretary of state of the State of New York at Albany, N. Y., a description of said lands belonging to you in township fifteen (15) Totten and Crossfield's purchase, Hamilton county, New York, which have been appropriated by the State of New York pursuant to an act of the legislature of the State of New York entitled "An act to provide for the acquisition of lands in the territory embraced in the Adirondack park, and making an appropriation therefor" passed April 8th 1897.

A general description of the real property which has been so appropriated is as follows: A strip of land six rods in width extending

from the south line of township fifteen commencing at the southwest corner of lot 149 and running from thence across said township to the north line near the northeast corner as laid down on three certain maps filed in Hamilton, Warren and Essex county clerks' offices, showing the proposed route across said township of the Adirondack Railway Company and being the same land reserved by you in your deed to the State.

On said description so filed in the office of the secretary of state on October 7th, 1897, there was endorsed a certificate of the said The Forest Preserve Board stating that the said lands had been appropriated by the State of New York.

Dated Albany, October 7th, 1897.

CHARLES H. BABCOCK,
CAMPBELL W. ADAMS,
The Forest Preserve Board.

(Acknowledged in Albany county, October 7th, 1897. County clerk's certificate as to notary's signature dated October 7th, 1897.)

(Here follows a copy of the resolution of the forest preserve board, of which Exhibit 11 is a copy.)

77 STATE OF NEW YORK, } ss.:
County of Albany, City of Albany, }

I, John A. Cole, being duly sworn, depose and say that I am over twenty-one years of age; and on the 7th day of October, 1897, at the city of Albany, I served on William McEchron, the president of the Indian River Company, a notice of which the foregoing papers is a copy by delivering to and leaving the same with said William McEchron personally.

JOHN A. COLE.

Sworn to before me this 7th day of October, 1897, as interlined.

J. J. FOURQUREAN,
Notary Public.

(County clerk's certificate as to notarial signature dated October 7th, 1897.)

The foregoing notice was recorded in the office of the clerk of Hamilton county on October 8th, 1897, at one o'clock in the afternoon in Book 30 of Deeds, at page 545.

Examination of witness continued:

Plaintiff's Exhibit 11 is a certificate of the forest preserve board for condemning property. Yes, I have seen the original of that paper. I filed the original in the office of the secretary of state.

Q. When?

A. The date that it bears endorsed there.

Q. The hour and minute?

A. About between ten and five minutes to twelve o'clock that morning.

Q. On the 7th day of October, 1897?

A. Yes, sir.

Yes, the paper marked Plaintiff's Exhibit 12 is the same paper with the record of the county clerk's office.

My attention is called to the affidavit of John A. Cole, purporting to be an affidavit of service of the paper on the president of the Indian River Company. Yes, that service was made in my presence. It was made in the rooms of the forest preserve board some time between ten and five minutes of twelve.

78 Plaintiff's counsel offers in evidence deed dated September 2d, 1897, between said The Indian River Company, party of the first part, and the People of the State of New York, party of the second part. Consideration $164,000, the receipt of which is confessed and acknowledged. Conveys all that tract of land situate in the counties of Warren, Hamilton and Essex and State of New York, and known and distinguished as township No. 15, Totten and Crossfield's purchase, supposed to contain at this time 24,000 acres more or less, a part thereof having been heretofore sold and conveyed. Also conveys tract of land in township 32. The following exceptions are contained in the deed:

"Also, excepting and reserving to the party of the first part, its successors or assigns, the right perpetually to maintain, use, control and operate the dam now, as well as such as may hereafter be raised, constructed, repaired or improved, at the outlet of Indian lake, and also such other dam or dams as may be constructed across the Indian river, lower down said river (whether located on the above-described land or not); also to flow all the land which the waters raised by such dams will cover; also to flood the lands by drawing waters from the ponds raised by said dams as per the usual course of river driving for lumber purposes; also the right at any and all times of entry and operating upon said lands so far as may be reasonable and necessary to construct, repair and maintain said dams for flooding and driving out logs, and operate and control said dams, and to appropriate and use so much of the rock, stone and soil of said lands as may be reasonably necessary to appropriate or use for constructing and maintaining said dams. The foregoing reservation to be subject, however, at all times to the right of the party of the second part by the superintendent of public works to draw water from the reservoir created by the dam at the outlet of Indian lake, whenever, in his judgment, it shall be required for canal or other State purposes.

79 Also, subject to the right of the purchaser of timber and logs from said lands to sluice such timber and logs over said dam in common with others upon paying the proportionate share of the expense thereof. Such sluicing to be done at the same time with the other owners of logs, thereby economizing the use of water.

The aforesaid rights shall be forfeited and cease, anything hereinbefore contained to the contrary notwithstanding, provided the party of the first part, its successors or assigns, shall neglect or fail

to maintain such dam at the outlet of said Indian lake. A break of said dam or destruction thereof shall not be deemed a failure to maintain the same, provided it shall be properly repaired or constructed within a reasonable time after such injury shall occur.

Also, excepting and reserving 'so much of that tract of land situate in Warren, Essex and Hamilton counties and known as part of township 15 of the Totten and Crossfield's purchase, as is comprised within the route adopted by the Adirondack Railway Company over said township as shown by the maps filed by the said Adirondack Railway Company in said counties.'"

The premises described in this deed are sold subject to all unpaid taxes since 1892, and the party of the second part assumes and agrees to pay off and discharge the same in addition to the consideration expressed in the deed. Acknowledged in Albany county on October 2nd, 1897, and recorded in the office of the clerk of Hamilton county October 8th, 1897, at one o'clock in the afternoon, in Liber 30 of Deeds, at page 539.

Same received in evidence and marked Plaintiff's Exhibit 13.

Plaintiff's counsel offers in evidence a deed in all things identical with the foregoing deed, Exhibit 13, except that the following exception is omitted therefrom:

"Also excepting and reserving 'so much of that tract of
80 land situate in Warren, Essex and Hamilton counties and known as part of township 15 of the Totten and Crossfield's purchase as is comprised within the route adopted by the Adirondack Railway Company over said township as shown by the maps filed by the said Adirondack Railway Company in said counties.'"

The deed now offered was acknowledged in Albany county October 2nd, 1897, and was recorded in the office of the clerk of Warren county on the 7th day of April, 1898, at ten o'clock in the forenoon in Book 80 of Deeds at page 254.

Same received in evidence and marked Plaintiff's Exhibit 14.

Examination of witness continued:

Q. I show you Plaintiff's Exhibit 13. When did you first see that deed and what was done with it?

A. This was presented by Mr. Ashley to the board, October 2nd, 1897. It was placed in a pigeon-hole and remained there until October 7th when I forwarded it for record.

I first saw Plaintiff's Exhibit 14 on October 2nd. That was to be held subject to the direction of the court. That deed is the deed without the exception, which is the deed which they were restrained from delivering. It was handed to me to be recorded if the court should permit the same at the end of the proceedings which were then pending. Yes, that was on the 7th of October. The deed remained in my possession until some time in April, 1898; until I got a certified copy of the order of the court. It was handed to me by Mr. Ashley, who was then counsel in all these matters for the Indian River Company; and it remained in my possession until

the day before it is marked recorded, and then I sent it to the clerk's office to have it recorded.

Cross-examination by Mr. CARR:

Q. Those deeds were not delivered in the forms which they are now?

81 A. The deeds with the strip excepted, Plaintiff's Exhibit 13, the certificate of the county clerk as to the authority of the notary to take the acknowledgment was not attached until the 7th day of October, and as to this deed, Plaintiff's Exhibit 14, it was not attached until the 4th of April.

Q. In all the deeds that were handed to you on September 14th, the certificate as to the authority of the notary was not attached until the 7th of October, was it?

A. No, sir. No, the deed from the Indian River Company that contained the exception of the right of way of the Adirondack Railway Company did not have the certificate of the clerk attached until the 7th day of October, and the deed from the Indian River Company conveying without any exception at all did not have a certificate of the county clerk attached until April, 1898. The deed from the Indian River Company containing the exception was handed to me by Mr. Ashley on the 2nd day of October. Yes, a deed from the Indian River Company for township 15 had been handed to me before that time. That was the one conveying the entire township without any exception.

Q. When was that handed to you?

A. There was no deed executed. A form of deed was made at this meeting——

Q. Was any executed deed handed to you?

A. No, sir.

Q. So that this deed of the 2d of October, from the Indian River Company to the forest preserve board, Exhibit 13, was the first?

A. Yes, sir.

I did not see, prior to the 2d of October, an executed deed from the Indian River Company conveying township 15.

Yes, I understood that prior to the 2d day of October an injunction was pending. I could not tell when that injunction was served. It was prior to the 2d of October, at all events. Yes, on the 2d of October I was aware of the fact that proceedings were pending for the vacation of the injunction. I could not say when the motion for the vacation of the injunction was argued. There

82 was an application made *ex parte* on the papers before Judge McLaughlin. Yes, the injunction was made by him and a motion was made before him to vacate that injunction on the papers on which it was granted. I could not say just what time in October it was argued. It was, at all events, within two or three days after the 2d of October. Yes, that motion was denied. I was present at the time when that motion was argued. I went down to the city of New York.

Q. Did you go there as the attorney for the forest preserve board? Did you not go there and represent them?

A. The forest preserve board did not appear on that argument.

Q. Did you go down there as the attorney for the forest preserve board—in the interest of the forest preserve board?

A. Yes, sir.

Yes, I am able to say whether these deeds or any of them were taken to New York at that time. It is my best recollection that I took them down, because I know I took down a bunch of papers, and it is my recollection that they were among them, I mean the deeds giving title from the Indian River Company. Yes, it is my impression that I took them down there with me. I brought back all the papers I took down with me.

Q. You spoke about the service of some papers on the 7th day of October on the president of the Indian River Company.

A. Yes, sir, on Mr. William McEchron of Glens Falls, New York.

I served the papers which were marked Plaintiff's Exhibit 11. That is a certified copy of the paper on file in the county clerk's office. Yes, it purports to be the same resolution of the forest preserve board.

Q. Where did you serve that on Mr. McEchron?

A. In the office of the forest preserve board. I didn't serve it, Mr. Cole served it, Mr. John A. Cole.

At the time it was served my impression is that Mr. Ashley and Mr. Fowler and Mr. McEchron and Miss Griffin, the lady
83 stenographer, were present. Mr. Casey was not there. I think the commissioners were there at the time I signed the papers and stepped down to the secretary of state's office to file the papers and came right back.

Q. When you say you stepped down to the secretary of state's office and filed the papers and came right back, what papers do you mean?

A. The notice which appears on that paper (indicating paper marked Plaintiff's Exhibit 11).

Q. And that was the one you filed in the secretary of state's office?

A. Yes, sir; about 11.50 a. m.

Q. Did you take any particular notice of the time you did so?

A. I took notice of the time it was served on Mr. McEchron because it was immediately after I had stepped downstairs to the secretary of state's office and filed the paper.

Q. Was anything said by anybody else there with regard to the time when service was made on Mr. McEchron?

A. I don't think there was any reference made to it, except with reference to securing the county clerk's certificate; and I assumed that it had to be obtained before twelve o'clock.

Yes, at the time the service was made on Mr. McEchron, the affidavit of service was all prepared and ready for signature and was signed.

After the service was made on Mr. McEchron it is my recollection that Mr. Fowler took all the papers down to the clerk's office for the certificate. No; I didn't go. I think I was there in the office

for the next half hour, and then I went down to the Delaware & Hudson depot, where I met you.

I do not know whether Mr. Ashley and Mr. McEchron remained in the office until I went down to the depot, or whether they went out; I couldn't swear definitely. It is my impression that they went out and then came back.

Q. Did you go down to the depot with them or did you find them there when you got there?

A. We had separated; part of us went together and part of us went somewhere else, and we all came together about at that
84 little fruit stand on Maiden lane. Yes; we all got together and went north on the train and that was on the 7th day of October.

At the time that transaction took place I was acting in connection with what went on in this matter as the attorney for the forest preserve board, and I had been attorney for some time previous with regard to this township 15. Yes; I understood on the 7th day of October that the Adirondack Railway Company filed a right of way over township 15, and I understood that these proceedings were taken on the 7th day of October by the forest preserve board; that a map was still on file in all the clerks' offices that affected township 15; I think that that was understood by the members of the forest preserve board. No; I have not any doubt about it.

Yes; I understood that after, or subsequent to that time, proceedings had been begun to condemn a right of way over township 15. The first hearing to be had, so far as these papers were concerned, was at the November term of the court in Warren county. I was there at that time acting for the forest preserve board.

Q. Did you join in the application for an adjournment of the proceedings at that time?

A. I asked you to have it adjourned and you kindly consented.

Yes; I understood they were adjourned until the 21st of December, 1897. I could not tell you whether prior to the 21st of December I took any other steps to have these proceedings adjourned to a later time.

Q. Don't you remember that it was your suggestion that they be adjourned and that nothing be done in the matter until the determination of the appeal that was then pending to vacate the injunction?

A. I know that that was my idea and I talked with you about it. Somewhere just then I dropped it.

Q. The last that you did, if anything, to have them adjourn was what you did in conference with me when you expressed that view that it ought to be withheld until the decision of the appeal—that is, the decision of the appeal, not the argument?

A. Yes, sir; I said the decision, not the argument.

85 Q. I take it that you knew when the appeal was argued, did you not?

A. No, sir; I wanted your wishes consulted as to when it should be brought on and your engagements consulted, that you had consulted our exigencies and we wanted to know your wishes.

Yes, the result was that it went over into January to be argued. I know there was some friction at that time.

Q. I show you a letter purporting to be written December 17th, 1897, and ask you if it is a letter written by you to me on the subject.

A. Yes, sir.

Letter marked Defendants' Exhibit A for identification.

Those deeds with the exception of Plaintiff's Exhibit 14—the one without the exception—I delivered on board the train to Mr. Fowler to take up for record. The notices of condemnation that were to be recorded in Warren county I delivered to the clerk of Warren county.

Q. When did this service take place?

A. About ten minutes to twelve o'clock. I desire to explain. I wanted to get a clerk's certificate in order that this record of condemnation might be recorded in the various county clerks' offices, and I assumed that possibly the clerk's office closed at noon, and I endeavored to get there at that time, and it was for that reason I took out my watch, and it was between from ten to five minutes to twelve o'clock.

Q. Do you remember what day of the week this was, it was not Saturday?

A. No, sir; it was simply because in the country our clerk's office closes at noon that I tried to get there before twelve o'clock.

Q. I show you another letter and ask you if that one was written by you at about the time that bears date—October 11th, 1897.

A. I sent such a letter to you and also one to Mr. Moffat.

Letter marked Defendants' Exhibit B for identification.

86 FOSTER B. MORSS, being duly sworn as a witness for plaintiffs, testified as follows:

Direct examination by Mr. PAIGE:

I reside at Saugerties, New York, and am a civil engineer by profession.

Q. In the year 1897, after the 6th of August, were you at any time on township 15?

A. I was at Indian lake if that is in township 15, I was at the outlet of the lake and also up above.

I was there making some surveys for a dam. I was sent there by the State engineer. I was in the employ of the State engineer at the time. I was there about the 15th or 16th of August, 1897, and remained there between two and three weeks.

Q. What did you do?

A. We run a line for the location of a dam and put some levels.

Q. I suppose you cut out some trees and drove some stakes?

A. We drove some stakes and cut some brush, there were no trees there.

Q. That is all you did up there, you made a survey for a dam?

A. Yes, sir.

Q. Under the direction of the State engineer?
A. Yes, sir.
Right after the making of the survey I helped prepare plans and specifications.

Cross-examination by Mr. CARR:

I went up there shortly after the 15th of August. Yes, this was at the outlet of Indian lake, and this dam was to be one at the outlet of Indian lake. It was contemplated to raise the water in the lake. Yes, those were the only surveys I made there and whatever brush I cut was in connection with this survey and whatever stakes I drove were in connection with these surveys. I surveyed for a dam by which it was expected to raise the water of Indian lake I think twenty or twenty-three feet, and that was all I did in connection with the dam. It was to determine something of the character of the place.

87 Redirect examination by Mr. PAIGE:

Q. Was the object of the dam to supply water to the Champlain canal?

Objected to as incompetent and improper and not the best evidence, nor does it appear what the purpose of the raising of the waters was. Objection overruled. Exception.

A. It was, partly, yes, sir.
I was there between two and three weeks. We went up, I think, the week of the 15th, and stayed three or four days, and came back to Albany. We went back on the Tuesday following and remained nearly two weeks. There were four of us in the party besides some men we hired up there. I think we had four when we went up and I think we hired six or seven laborers up there.

Recross-examination by Mr. CARR:

Q. You say that this dam was built for the purpose of supplying water to the Champlain canal; what was the other part*ly* for?
A. The other part was for water power on the Hudson river.
Q. On the stream that runs out of Indian lake, was it?
A. No; in the Hudson river proper.

Plaintiff's counsel offered in evidence the following evidence from the minute book of the forest preserve board, being an extract from the minutes of the meeting of said board held on the 1st day of October, 1897.
Same received in evidence and marked Plaintiff's Exhibit 15, as follows:

ALBANY, *October* 1*st*, '97.

The forest preserve board met at its office in the capitol, pursuant to call of the chair.

There were present Commissioners Woodruff, Babcock and Adams.

President Woodruff in the chair.

The Adirondack R. R. Co. appeared before the board, by
88 counsel, and served a copy of summons and complaint, affidavits, preliminary injunction, and order to show cause in an action entitled—

Supreme Court, Essex County.

ADIRONDACK R. R. Co.
vs.
THE INDIAN RIVER CO. ET AL.

After hearing Messrs. McEchron, Underwood, Ashley and others Mr. Adams offered the following resolutions:

Resolved, That upon the filing of the bond of the Indian River Company for the full completion of the dam at present in course of construction in accordance with the contract and specifications attached to said bond, this board accepts the deed tendered, covering about 18,000 acres of land, in township 32, T. and C. P., and about 24,000 acres of land in twp. 15, T. and C. P., and that the sum to be paid therefor, including the present structures thereon, and certain structures contracted for and in process of construction by said Indian River Co., together with all damages accruing from such appropriation of said land and structures to be $164,000, and that a certificate for that sum be issued by this board in full payment therefor; and that of said sum $99,000 shall be immediately due and payable upon the filing with the comptroller of the certificates of the clerks of Hamilton, Warren and Essex counties on the recording of said deed; that $15,000 shall be due and payable upon the filing with the comptroller of the certificate of the State engineer that the shores of Indian lake have been cleared in accordance with the terms of the before-mentioned contract, subject, however, to the deduction of such sum as may be required to settle any judgment of the Court of Claims for the condemnation of any land within the limits of the flow-line of the new dam which the parties of the first part may request the State to take; of the remaining $15,000, $15,000 shall be due and payable on or after
May 1st, 1898, upon the filing of a certificate of the State
89 engineer that sufficient work has been duly and properly performed, under the existing contract between the Indian River Co. and Michael McDonough and others to justify, under the engineer's estimate, the payment by the Indian River Co. to said contractors the sum of $25,000; $10,000 shall be due and payable on or after July 1st upon the filing of a similar certificate by the State engineer showing that, under the engineer's estimate $15,000 is due to said contractors; $15,000 on or after September 1st, upon

the filing of the certificate of the State engineer showing that upon the engineer's estimate the sum of $70,000 is due to said contractors; and the remaining $10,000 upon the filing of the certificate of the State engineer that the work has been completed in all respects in accordance with the plans and specifications which are a part of the contract annexed to the above-mentioned bond. And that the above-mentioned bond shall be deemed to be satisfied and discharged upon the filing of said final certificate of the State engineer.

And that it is understood and agreed by and between the forest preserve board and the Indian River Company that if the Indian River Co. shall themselves, after due effort, be unable to acquire the interest of any land-owners whose land lies within the limits of the flow-line of the dam above referred to upon the request of said Indian River Co. the State will institute proper proceedings, under the statute, for the purpose of acquiring such land.

After due and careful consideration of the resolution of Mr. Adams it was adopted with the following amendment:

"That inasmuch as the Indian River Co. has been enjoined from transmitting to the State about 100 acres of township 15, and made application to the court to set aside said injunction, that this board accept a deed of townships 32 and 15 with the reservation of the right of way together with an agreement from the Indian River Company to make no claim against the State by reason of any judgment it may obtain in the Court of Claims in case the State shall proceed to condemn said 100 acres reserved in said deed, and that in case said injunction shall be dissolved, and the proposed original deed shall be delivered, that then said deed and agreement above mentioned shall be deemed null and void as the original deed shall be received in lieu thereof, and that, upon the receipt of said original deed, the certificate referred to in Commissioner Adams' resolution shall then issue, and that in case the board shall be advised that the court has refused to dissolve the injunction, that proper condemnation proceedings shall be immediately instituted and the notice served forthwith and upon the service of the notice the certificate shall issue."

The plaintiff's counsel offered in evidence order of the appellate division in the third department, entered in the office of the clerk of Essex county on the 11th day of April, 1898.

Same received in evidence and marked Plaintiff's Exhibit 16, as follows:

At a term of the appellate division of the supreme court, in the third department, held in its court-house in the city of Albany, N. Y., on the 2d day of March, 1898.

Present: Hon. Charles E. Parker, P. J.; Hon. D. Cady Herrick, Hon. Judson S. Landon, Hon. John R. Putnam, Hon. Milton E. Merwin, JJ.

ADIRONDACK RAILWAY COMPANY, Plaintiff and Respondent,
against
INDIAN RIVER COMPANY, WILLIAM McECHRON, and Others, Defendants and Appellants.

The appeal of the defendants from the order in this action
91 made at a special term at Plattsburgh, N. Y., on the 16th day of October, 1897, continuing the injunction therein described, having been heard and considered; now, on motion of the attorneys for the defendants, it is—

Ordered that said order so appealed from be and is reversed, and that the injunction granted in this action by Mr. Justice McLaughlin be and is wholly vacated, with ten dollars costs and 65.42 dollars disbursements.

V. W. PRIME, *Dep. Clerk.*

Plaintiff's counsel offered in evidence a certified copy of the judgment-roll of the proceedings for the condemnation of real property instituted by the Adirondack Railway Company against the Indian River Company and others, filed in the office of the clerk of Warren county on the 18th day of March, 1898. Said record consisted of the following papers:

(1.) Notice dated October 7th, 1897, of presentation of petition at Caldwell special term on the second Monday of November, 1897, signed by Lewis E. Carr, attorney for the Adirondack Railway Company.

(2.) Petition for condemnation of real property, dated and verified October 7th, 1897.

(3.) Affidavit of service of petition and notice as follows: On—
Phœbe A. Hitchcock, October 7th, 1893, at 11.25 a. m.
Isabella Finch, October 7th, 1897, at 2.05 p. m.
Elizabeth Ashley, October 7th, 1897, at 2.50 p. m.
Indian River Co., October 7th, 1897, at 7.17 p. m.
Eugene L. Ashley, October 7th, 1897, at 8.15 p. m.
Daniel J. Finch, October 7th, 1897, at 8.35 p. m.
Jeremiah W. Finch, October 9th, 1897, at 5.45 p. m.
Augusta Finch, October 13th, 1897, at 12.22 p. m.
92 Margaret McGinn, October 13th, 1897, at 4.30 p. m.
John McGinn, October 14th, 1897, at 7 a. m.

(4.) Notice dated October 19th, 1897, of presentation of petition *of* Caldwell special term on second Monday of November, 1897 (second proceeding), signed by Lewis E. Carr, attorney for Adirondack Railway Company.

(5.) Petition for condemnation of real property (second proceeding), dated and verified October 19th, 1897.

(6.) Affidavit of service of petition and notice (second proceeding), as follows: On—
Phœbe A. Hitchcock, October 25th, 1897, at 3.35 p. m.
Elizabeth Ashley, October 25th, 1897, at 4.05 p. m.
Isabella Finch, October 25th, 1897, at 6.10 p. m.
Daniel J. Finch, October 25th, 1897, at 6.10 p. m.

Indian River Company, October 25th, 1897, at 6.25 p. m.
Eugene L. Ashley, October 26th, 1897, at 8.45 a. m.
Jeremiah W. Finch, October 29th, 1897, at 11.50 a. m.
Augusta Finch, October 29th, 1897, at 11.50 a. m.
John McGinn, October 26th, 1897.
Margaret McGinn, October 26th, 1897.

(7.) Answer of defendant Indian River Company by Ashley, Williams & Fowler, its attorneys, verified November 9th, 1897.

(8.) Answer of defendants Eugene L. Ashley, John McGinn and Jeremiah W. Finch by S. & L. M. Brown their attorneys, verified November 10th, 1897.

(9.) Answer of defendants Daniel J. Finch and Isabella his wife, Elizabeth Ashley, Margaret McGinn, Augusta Finch and Phœbe A. Hitchcock by Ashley, Williams & Fowler, their attorneys, verified November 10th, 1897.

(10.) Order made at special term, Essex county, on December 21st, 1897, Hon. Chester B. McLaughlin, justice presiding, adjourning trial of both proceedings to the second Saturday of February, 1898, and transferring the hearing and trial thereof to special term to be held at Plattsburgh on such day.

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(11.) Order of reference to Hon. L. L. Shedden, of Plattsburgh, to hear and determine, said order being entered on the consent of the attorneys for the defendants at a special term of the supreme court, held at the court-house in Plattsburgh on March 12th, 1898, Hon. S. A. Kellogg, justice, presiding.

(12.) Oath of referee sworn to March 12th, 1898.

(13.) Decision of referee, dated March 12th, 1898.

(14.) Waiver of notice of application for the appointment of commissioners, dated March 12th, 1898, and signed by S. and L. M. Brown and by Ashley, Williams & Fowler, attorneys for defendants.

(15.) Judgment made at special term of the supreme court, held at the county court-house in the village of Plattsburgh, on March 12th, 1898, Hon. S. A. Kellogg, justice, presiding, the mandatory part of which judgment was as follows:

"Now, on motion of Lewis E. Carr, attorney for plaintiff,

Adjudged, that the plaintiff is entitled to the relief demanded in its said petition herein. And it is further

Adjudged, that the condemnation of the following-described real property is necessary for the public use, that is to say: All that certain strip or parcel of land in the town of Johnsburg, county of Warren and State of New York, six rods in width, which lies in township 15 of the Totten and Crossfield purchase, and crosses the following lot numbers of said township, that is to say," (here follows a list of the lot numbers crossed), the courses and curvatures of said strip of land more fully and definitely appearing upon a map of the route adopted by said Adirondack Railway Company in the county of Warren, signed by the president and engineer of said company and filed in the office of the clerk of said Warren county on the 18th day of September, 1897. And it is further

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Adjudged, that the plaintiff, Adirondack Railway Company, is entitled to take and hold said property for the public use specified, to wit: the construction, operation and maintenance of the line of its railway, upon making compensation therefor. And notice of application therefor having been waived, it is further

Adjudged, that Edgar Hull, William Moore and James Warren, all of Glens Falls, Warren county, disinterested and competent freeholders and residents of the fourth judicial district of the State, be and they hereby are appointed commissioners to ascertain the compensation to be made to the owners of said property to be so taken for said public use; the first meeting of said commissioners to be held at Saratoga Springs, New York, on the 25th day of March, 1898, at two o'clock in the afternoon.

S. A. KELLOGG,
Justice Supreme Court."

Same received in evidence and marked Plaintiff's Exhibit 17.

Plaintiff's counsel offered in evidence certified copy of judgment-roll of the proceedings for the condemnation of real property in Essex county instituted by the Adirondack Railway Company against the Indian River Company and others. The papers in said judgment-roll were similar, except as to the description of the real property affected, to those contained in the proceedings brought in Warren county, as shown by Plaintiff's Exhibit 17 above.

Said judgment-roll was entered in the office of the clerk of Essex county on the 18th day of March, 1898, at nine o'clock in the forenoon.

Same received in evidence and marked Plaintiff's Exhibit 18.

95 Plaintiff's counsel offers in evidence certified copy of judgment-roll of the proceedings for the condemnation of real property in Hamilton county instituted by the Adirondack Railway Company against the Indian River Company and others. The papers in said judgment-roll were entered in the office of the clerk of Hamilton county on the 18th day of March, 1898, at eight o'clock in the afternoon.

Same received in evidence and marked Plaintiff's Exhibit 19.

It is stipulated, for the purposes of this trial only, that the day and hour of the filing of the *lis pendens* in each of the counties of Essex, Warren and Hamilton, was the day and hour of the recording of such *lis pendens*, and that the same was on such day and hour duly indexed against each of the defendants in each of said counties, and that the notices of pendency of these condemnation proceedings were filed respectively in the offices of the clerks of Warren, Essex and Hamilton counties as follows:

In the office of the clerk of Warren county (first proceeding) on October 7th, 1897, at twelve o'clock noon; (second proceeding) on October 26th, 1897, at nine o'clock in the forenoon.

In the office of the clerk of Essex county (first proceeding) on

October 7th, at 2.50 o'clock in the afternoon; (second proceeding) October 25th, 1897, at 4 30 o'clock in the afternoon.

In the office of the clerk of Hamilton county (first proceeding) on October 7th, 1897, at 1.15 p. m.; (second proceeding) October 25th, 1897, at 6 p. m.

Plaintiff's counsel offered in evidence motion papers on the part of the People of the State of New York entitled in each of these proceedings for leave to intervene and be made parties therein.

Objected to as immaterial. Objection overruled. Exception.

Received and marked in evidence Plaintiff's Exhibit 20.

96 It is conceded by defendants that such motion is still pending.

Plaintiff rests.

It is admitted for the purposes of this trial that no application has been made to change the location of the line appearing on the maps filed by the Adirondack Railway Company showing location of the road adopted by it across township 15.

It is admitted that this action was commenced by the service of the summons and of a copy of the complaint upon Mr. Charles A. Walker, secretary of the Adirondack Railway Company on the 25th of March, 1898.

Defendants' counsel offers in evidence extract from the minutes of the forest preserve board of a meeting of said board held October 7th, 1897.

Same received in evidence and marked Defendants' Exhibit C, as follows:

ALBANY, N. Y., *October* 7, 1897.

The forest preserve board met at its office pursuant to call issued by the president.

"To Hon. Campbell W. Adams and Hon. Charles H. Babcock.

GENTLEMEN: It seems necessary that there should be a special meeting of the forest preserve board. Therefore, pursuant to the resolution of adjournment that the board should meet subject to the call of the chair, I hereby call a special meeting of the forest preserve board to meet in its office at the capitol in Albany, N. Y., on the 7th day of October, at 11.30 a. m.

TIMOTHY L. WOODRUFF,
President F. P. B.

There were present Commissioners Adams and Babcock.

On motion of Commissioner Adams, Commissioner Babcock was elected temporary president, and John S. Casey was instructed to act as temporary secretary.

97 Relative to the proceedings in the meeting of October 1st, as to the Indian River Company, J. P. Allds, attorney for the board, reported as follows:

I desire to report to you that upon the *ex parte* application, argued before Judge McLaughlin, he refused to vacate the temporary in-

junction which had been granted upon the *ex parte* application; that he likewise refuses to make a condition of his order that the plaintiff, The Adirondack Railway Co., should be stayed from filing *lis pendens* until the hearing of the motion on its merits October 11th, and that the conditions contemplated in Commissioner Adams' resolution of the meeting held October 1st and 2d is before the board, viz: the refusal to vacate the injunction so that the original deed can be delivered before the time expires under which the railroad company will have the right to bring condemnation proceedings and file *lis pendens*, and that in pursuance of that resolution, I have requested a certificate from the State engineer of an accurate description of the land reserved in the deed from the Indian River Company, which was accepted at the last meeting. And I do further report that the description is here present before the board, and that it covers land which adjoins lands already owned and appropriated by the board.

On motion of Mr. Adams, the report of Mr. Allds was received and ordered filed.

Commissioner Adams offered the following resolution, which was adopted:

Resolved, That the board endorse upon the description of the land furnished by the State engineer the certificates required by statute, and that the lands therein described be and hereby *is* condemned for the purpose of making them a part of the Adirondack park, and that said certificate, together with the endorsement of the board, be immediately filed in the office of the secretary of state, and that forthwith and hereafter the proper notice required by section 4 of chapter 220 of the Laws of 1897 be signed and served upon the owner of said land, and that copies of such notice and proof of service upon the owner be forwarded to the county clerk's office of Essex, Warren and Hamilton counties for record, in pursuance of the provisions of said section 4 of chapter 220 of the Laws of 1897.

98 Defendants' counsel offered in evidence affidavits showing services of the notice of filing of the maps in the several counties of Warren, Hamilton and Essex as follows, on—

John McGinn, September 21st, 1897.
Daniel J. Finch, September 21st, 1897.
Glens Falls Paper Mill Company, September 21, 1897.
Indian River Company, September 23rd, 1897.
Eugene L. Ashley, September 28rd, 1897.
Phœbe A. Hitchcock, September 23rd, 1897.
Jeremiah W. Finch, October 1st, 1897.

Same received in evidence and marked Defendants' Exhibits D, E, F, and G.

EUGENE L. ASHLEY, being duly sworn as a witness for defendant, testified as follows:

Direct examination by Mr. CARR:

I reside at Glens Falls, New York, and am an attorney-at-law. Yes, I am the Eugene L. Ashley who has been named as represent-

ing the Indian River Company in connection with township 15, and am one of the defendants to this action. Yes, I was one of the defendants in the condemnation proceedings for a right of way of the Adirondack Railway Company over township 15.

I was present all through the meeting of the forest preserve board held on October 7th, 1897. I was present there at the time a copy of the resolution was served upon the president of the Indian River Company on behalf of the State—Plaintiff's Exhibit 11. That service took place in the rooms of the forest preserve board. It was after the meeting of the forest preserve board had been held.

Q. Are you able to say what time of day it was that that service was made?

99 A. I would like to state the circumstances. We had been lingering around there all the forenoon for the purpose of getting this matter in shape, and the forest preserve board had been in session and the papers executed and Mr. Allds went out. I remember Mr. Fowler's saying to me that he expected to go to the various county clerks' offices to file these papers and that they wanted to get these certificates; and they telephoned over to the county clerk's office about it. Then Mr. Allds came into the room and asked for Casey, who was not present, and he turned to Mr. Cole. Mr. McEchron and I were there, and I was nervous for fear we would miss the train. Mr. Allds turned to Mr. Cole and told him to serve Mr. McEchron, and we all looked at our watches and it was a quarter to one o'clock. We then went out and we all met at the station. I remember I stopped on the way to the station at a news-stand on Maiden lane just below Pearl street and bought a fountain pen. We didn't have our papers completed and we completed our papers going up on the train from here.

Q. What papers do you refer to as not completed?

A. The papers to file in the county clerk's office. We were to have them filed in the county clerk's office and he was to note the time of day of its receipt by him and enter it on — record—the time of its receipt by him, and it was these papers we completed on the train.

No, I was not present at the Warren county term in November when the condemnation proceedings in behalf of the Adirondack Railway Company for this right of way over township 15 first came up.

Q. Previous to that time, or subsequent to that time, did you have any conference or interview with Mr. Allds so that you were able to talk over any answer that was put in?

A. Mr. Allds and myself were preparing the answer in my office in Glens Falls and he took a carriage and drove over. I mean the answer in proceedings taken by the Adirondack Railway Company. Yes, that answer was drawn and served, and that is the one that Mr. Allds and I were engaged in preparing at that time.

100 Cross-examination by Mr. PAIGE:

Yes, I was present at the court-house in the village of Plattsburgh on the first day of March, 1898, when the Adirondack Rail-

way Company's condemnation proceedings came on. I had had notice from time to time of the adjournment of those proceedings. I had the usual notice that an attorney gets from time to time in a case that there was something to be done in the matter on the 12th day of March at Plattsburgh.

Q. What notice did you get that the proceedings had been adjourned to a day in the future to be fixed upon?

A. No, sir, it was adjourned to a definite day from time to time.

Q. When was the adjournment made to the 12th of March?

A. On the 12th of February.

Q. Mr. Ashley, did you notify anybody in the employ of the State that there was to be such a hearing on the 12th of March?

A. I could not say that I stated that the hearing was to go on the 12th of March, but I notified Mr. Allds by letter. This proceeding had just been adjourned from time to time pending the appeal to the appellate division from the injunction order; and it was understood by Mr. Allds and myself that if the decision was satisfactory to the forest preserve board and the State, and the injunction was dissolved that they should then file the deed that was delivered in escrow, and that there would be no other proceeding on the part of the State, and that the deed vested complete title in the State, and the proceedings ended. I came to Albany about a week before the 12th and asked Mr. Carr if he expected to go on with it, and he said he did; and I went up to the forest preserve board, and searched for Mr. Allds, but didn't see him. I wrote a letter to him in which I said that there had been a decision of the appellate division which was favorable to the forest preserve board and that I understood there was nothing further to be done on my part; and, in the meantime, in a conversation with Mr. Carr, he stated that if I made a fight on behalf of our clients he would expect us to pay the
101 costs. I told him I didn't care to burden my clients with costs. I had heard nothing from Mr. Allds and I went to Plattsburgh and I expected that somebody would be there. I just stayed there and carried out what I understood to be the understanding.

Q. You made the consent described in the record?

A. I could not say as to that. If you will show it to me I can tell you whether I did.

Q. An order is made referring the issues to L. L. Shedden; on the same day Mr. Shedden made his findings of fact. Did you appear before Mr. Shedden?

A. I was there; yes, sir.

Q. Did you appear?

A. Yes, sir; I was there. I don't know whether I appeared or not.

Q. You were entitled to notice before Mr. Shedden?

A. Yes, sir.

Q. Unless you appeared, Mr. Ashley, the findings of fact are not good for anything?

A. I think I examined the witness.

Q. On the same day the report of Mr. Shedden was presented to

the court and the record contains a notice of application for the appointment of commissioners to condemn lands sought to be taken in the proceedings; and a stipulation purporting to be signed by S. & L. M. Brown and by Ashley, Williams & Fowler?

A. That was signed subsequent to that.

Q. Did you sign such a stipulation?

A. Yes, sir.

Q. And did you appear when the court on the same day gave the adjournment?

A. Yes, sir. I appeared before Judge Kellogg and stated to him the situation.

Q. Will you send me a copy of that letter you have spoken of that you sent to Mr. Allds?

A. Yes, sir.

WILLIAM MCECHRON, being duly sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. CARR:

102 I live at Glens Falls, New York. Yes, I was president of the Indian River Company. That corporation was organized some time in 1897.

Q. And were you also one of the owners of an interest in township 15?

A. Not until the Indian River Company bought township 15.

Q. And about when was it that the Indian River Company was organized?

A. Well, I should have to guess at that.

Q. Was it in September, 1897?

A. In September, I would think. I have no memorandum of it now.

Yes, I was present here in Albany, in the office of the forest preserve board, on October 7th, 1897. I am the person on whom notice of the resolution of the forest preserve board was served that day. That took place at the rooms of the forest preserve board.

Q. Are you able to say the hour and minute of the day that service took place?

A. Not as to minutes.

Q. What is your best recollection?

A. I might explain that at the time it was served I made a note on the wrapper of the paper with pencil at the suggestion of Mr. Ashley. I do not now know where that paper is. I should say it was some time between twelve and one o'clock. I don't know now where that paper is. The paper was served on me some time between the hours of twelve and one o'clock.

By Mr. PAIGE:

Q. Do you remember anything about it?

A. I remember it is safe to say between twelve and one.

By Mr. CARR:

After the service of that paper was made we went to the one o'clock train and we stopped on our way down at a book store. We all started very soon after it was served for the train. Yes, we stopped at a fruit stand down near the depot, and I should say that the one o'clock train left within five minutes after we reached there.

Q. What is your best recollection as to the length of time after the service of the copy of the resolution until your arrival at the depot?

A. Thirty minutes.

103 FRANK D. ANTHONY, sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. MOFFAT:

I am a civil engineer by profession, and was in charge of the surveys of the line across township 15 adopted by the Adirondack Railway Company. Yes, I am familiar with that locality.

Q. What is the character of that land?

A. Forest land.

EUGENE L. ASHLEY, recalled as a witness on behalf of the defendants:

Direct examination by Mr. CARR:

Q. I show you some deeds and papers that are marked Plaintiff's Exhibit 1 to Plaintiff's Exhibit 10 inclusive. Do you recognize these papers?

A. Yes, sir; I prepared them.

Q. And after their preparation and execution what was done with them?

A. I prepared most of them; they were prepared in my office. They were delivered to Mr. Allds of the forest preserve board.

Q. When were they given to him?

A. They were given to him on the train the day we went to New York to argue the motion before Judge McLaughlin to vacate the injunction, on Monday, October 4th.

Q. They were delivered to Mr. Allds on that day going down to New York?

A. Yes.

LEWIS E. CARR makes a statement on behalf of the defendant as follows:

I was the attorney for the Adirondack Railway Company in the action in which an injunction was obtained. The hearing of the motion to vacate that injunction on the papers was fixed by Judge McLaughlin to be heard before him at the Manhattan hotel,
104 New York, on the evening of October 4th, 1897, for the reason that he was assigned to hold a term of court there commencing Monday, and this was Monday evening and he would have

no opportunity to hear it in Essex county. All the parties interested appeared before him on that motion when it was argued.

The condemnation proceedings that came on in November at Caldwell were adjourned by consent of all parties to be heard by Judge McLaughlin December 21st.

The two proceedings were instituted in each county for the reason that fifteen days had not elapsed after the serving on Jeremiah W. Finch of the notice of the filing of the maps when the first proceeding was commenced; but aside from that the two proceedings were identical and it was arranged by Mr. Allds representing the forest preserve board and by Mr. Ashley and myself, that the proceedings should be tried and considered as one proceeding.

The time fixed was December 21st. Before that came around, Judge McLaughlin was appointed to the appellate division of the first department, and it was apparent that the hearing could not be had before January, and upon the consent of all parties appearing it was agreed that the hearing and all proceedings be transferred before Judge Kellogg, the time as I remember being January 21st; but in January a further adjournment of the proceeding was had to the 12th of February, and on the 12th of February a further adjournment was had to the 12th day of March. All the proceedings were regularly adjourned by the stipulation of the attorneys representing the different parties.

By Mr. PAIGE:

Q. It was agreed that when the hearing of the appeal was put over the November term that these proceedings should go over until the decision of the appeal?

A. Not exactly agreed, but there was that understanding.

Defendants' counsel offers in evidence letter from J. P.
105 Allds to Mr. Carr dated December 17th, 1897, marked Defendants' Exhibit A for identification.

Received in evidence and marked Defendants' Exhibit A, as follows:

Timothy L. Woodruff, Brooklyn, president; Charles H. Babcock, Rochester; Campbell W. Adams, Utica; Merton E. Lewis, secretary.

STATE OF NEW YORK,
THE FOREST PRESERVE BOARD, ALBANY, *Dec.* 17, 1897.

Mr. Lewis E. Carr, Albany, N. Y.

DEAR SIR: I am in receipt of your favor of Dec. 15th, and am pleased to note that the case is to go over into January. I think myself that it should be until after we get the decision—rather than until after the argument in the appellate court.

Yours very truly, JOTHAM P. ALLDS.

Defendants' counsel offered in evidence a certified copy of the certificate of incorporation of the Adirondack Railway Company. Same received and marked in evidence Defendants' Exhibit D.

Said certificate recites, among other things, the following:

That the Adirondack Company was incorporated October 24th, 1863, in pursuance of chapter 236 of the Laws of 1863, entitled "An act to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness in the northern part of this State and the development of the resources thereof."

That immediately after it was incorporated said Adiron-
106 dack Company commenced the construction of its railroad and proceeded in the other business for which it was incorporated, and in the course of such business acquired certain lands in said wilderness.

That subsequent to and in pursuance of chapter 250 of the Laws of 1865, entitled "An act to authorize the Adirondack Company to extend its railroad to Lake Ontario and the River St. Lawrence, and to increase its capital," said Adirondack Company amended its articles of association so as to enable it to extend its railroad from its original terminus in the town of Newcomb, county of Essex, to a point on the St. Lawrence river, in the town of Oswegatchie, in the county of St. Lawrence, making the whole length of its railroad, including such extensions, as near as may be, 185 miles of railroad line passing through and into the counties of Warren, Essex and Hamilton, among others; and that it did increase its capital stock, and that the amended articles of association were filed in the office of the secretary of state on March 1st, 1871.

That on or about July 1st, 1872, said Adirondack Company mortgaged to a trustee in said mortgage named, all and singular its railroad and property connected therewith together with the rights, privileges, franchises and immunities of said Adirondack Company in trust to secure the payment of its bonds to be issued in pursuance of such mortgage, which bonds were duly issued.

That subsequently said Adirondack Company made default in the payment of the interest of said bonds, and that suit was brought to foreclose said mortgage, and that such proceedings were had in said suit that a judgment was made and entered therein on the 28th day of June, 1881, foreclosing said mortgage and directing that the whole of the property, rights and franchises covered by said mortgage be sold as in said judgment directed.

That said property, rights and franchises were accordingly sold under said decree and were purchased by and conveyed to William
Sutphen and William W. Durant by deed dated October 21st,
107 1881, and that said Sutphen and Durant acquired title to all the railroad, mortgaged lands and other property, franchises, privileges, easements, rights, immunities and liberties of said Adirondack Company covered by or included in said mortgage.

That said purchasers associated with themselves certain other individuals in said certificate named, all being residents and citizens of the State of New York, in order to be incorporated and to become a body politic and corporate, to take, hold and possess the title and property included in said sale, and to have all franchises, rights, powers, privileges and immunities which were possessed

before such sale by said Adirondack Company, and to take and receive a conveyance of and to succeed to, possess and exercise and enjoy all the rights, powers, franchises, privileges, easements, liberties, immunities, property, estate and effects, of which the title had been acquired at said foreclosure sale.

That this certificate was made for the purpose of incorporating such purchasers and associates as a new company, corporation and body politic and corporate, pursuant to chapter 469 of the Laws of 1873, and chapter 430 of the Laws of 1874, and chapter 446 of the Laws of 1876.

That the name of the new company and corporation intended to be formed by this certificate is the Adirondack Railway Company.

That said new corporation shall continue one thousand years.

That the railroad of said new company constructed and to be constructed and to be maintained and operated shall extend from a point in the town of Saratoga Springs, in the county of Saratoga, to a point in the town of Hadley, in said Saratoga county, and thence up and along the valley of the upper Hudson up to the town of Newcomb in the county of Essex, and thence to the River St. Lawrence at or near the city of Ogdensburgh.

That the length of said road is to be 185 miles.

108 That the names of each and every county of the State of New York through and into which said railroad is made and intended to be made are as follows: Saratoga, Warren, Essex, Hamilton, Franklin and St. Lawrence.

That the acts of the legislature under which said Adirondack Company was organized and the subsequent acts amending the same or additional thereto are as follows:

Laws of 1850, chapter 140; Laws of 1854, chapter 282; Laws of 1863, chapter 236; Laws of 1864, chapter 582; Laws of 1865, chapter 60; Laws of 1865, chapter 250; Laws of 1867, chapter 775; Laws of 1868, chapter 718; Laws of 1868, chapter 850; Laws of 1871, chapter 857; Laws of 1872, chapter 864; Laws of 1873, chapter 695; Laws of 1874, chapter 240.

The certificate was dated June 30th, 1882, and was filed and recorded in the office of the secretary of state on July 7th, 1882.

Defendants' counsel offered in evidence the affidavits of Charles B. Hibbard, sworn to September 30th, 1897, and October 5th, 1897, and the affidavit of David Willcox, being the same affidavits as are contained at pages 17 to 29 inclusive.

Same received and read in evidence with same force and effect as if said affiant had testified on the trial to the matters therein contained.

Defendants' counsel thereupon withdrew all exceptions to the ruling of the court on the admission of evidence.

109 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents, *against* THE ADIRONDACK RAILWAY COMPANY, Appellant. | Stipulation that Case Contains All the Evidence.

It is hereby stipulated and agreed that the foregoing case contains all the evidence taken on the trial of this action; and we do consent that the same be settled and ordered on file as the case on appeal herein.

Dated Albany, N. Y, November 7th, 1898

T. E HANCOCK,
Attorney General, for Respondents.
LEWIS E. CARR,
Attorney for Appellant.

On the foregoing consent, I do hereby settle the case on appeal as above printed, and do order the same on file as the case on appeal herein.

Dated Albany, N. Y., November 7, 1898.

ALDEN CHESTER,
Justice Supreme Court.

110 Supreme Court, County of Albany.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents, *against* THE ADIRONDACK RAILWAY COMPANY, Appellant. | Stipulation Waiving Certification.

It is hereby stipulated and agreed that the foregoing papers constitute and are a true copy of the judgment-roll, opinion at special term, notice of exceptions, notice of appeal, and case on appeal herein which has been settled as above printed.

Certification thereof by the clerk is hereby expressly waived.

Dated Albany, N. Y., November 7th, 1898.

T. E. HANCOCK,
Attorney General, for Respondents.
LEWIS E. CARR,
Attorney for Appellant.

111 At a stated term of the appellate division of the supreme court of the State of New York, held in and for the third judicial department, at the appellate division court room, in the city of Albany, on the 8th day of March, 1899.

Present: Hon. Charles E. Parker, P. J.
" Judson S. Landon, } JJ.
" D. Cady Herrick, }
" Milton H. Merwin, }

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *against* THE ADIRONDACK RAILWAY COMPANY, Impleaded, &c., Appellant. } Order of Reversal.

The appeal from the judgment in this action in favor of the plaintiff, rendered November 5th, 1898, and entered in the Albany county clerk's office November 7th, 1898, having been heretofore argued before this court by Lewis E. Carr and R. Burnham Moffat for the appellant, and E. Winslow Paige for the respondent; and due deliberation having been had thereon,

It is ordered, that the judgment appealed from be and the same hereby is in all respects reversed, and that a new trial of this action be and the same hereby is ordered, with costs to abide the event.

Justice Herrick, dissenting.

Justice Putnam, not sitting.

112 Supreme Court, Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE ADIRONDACK RAILWAY COMPANY, Impleaded, &c.

SIRS: You will take notice that The People of the State of New York appeal to the court of appeals of the State of New York from the order of the appellate division of the supreme court, for the third department, bearing date the 8th day of March, 1899, and hereby stipulate that if the said order be affirmed by the court of appeals, judgment absolute may be taken by the defendant against the plaintiffs.

Dated N. Y., March 16, 1899.

Yours, &c.,

JOHN C. DAVIES,
Attorney General, Attorney for Plaintiffs.

To Lewis E. Carr, Esq., attorney for defendant; clerk of the appellate division supreme court, 3d department, and the clerk of the county of Albany.

113 It is hereby stipulated and agreed that the foregoing papers constitute and are a true copy of the judgment-roll, and all papers upon which the appeal was heard by the appellate division, the order of reversal and the notice of appeal to the court of appeals.

Certification by the clerk is hereby expressly waived.

Sixteenth of March, 1899.

LEWIS E. CARR,
Attorney for Respondent.

JOHN C. DAVIES,
Attorney General, Plaintiffs' Attorney,
By EDWARD WINSLOW PAIGE,
Of Counsel.

114 Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents, *against* THE ADIRONDACK RAILWAY COMPANY, Impleaded, etc., Appellant. } Argued Nov. Term, 1898.

Before Parker, P. J.; Landon, Herrick, & Merwin, associate justices.

The action is one to enjoin the defendant from taking by condemnation proceedings, any part of the lands described in the complaint, for the purpose of its railway, on the ground that it is within the bounds of the "forest preserve" and of the "Adirondack park."

Upon the trial at special term, a judgment was rendered in favor of the plaintiff for the injunction so asked, and from such judgment this appeal is taken.

R. Burnham Moffat and Lewis E. Carr, for appellant.

G. D. B. Hasbrouck and Edward Winslow Paige, for respondents.

PARKER, *P. J.*:

The defendant had acquired from the State a franchise to build and operate its road through the counties and region which the State subsequently, by the act of 1895, chap. 395, sec. 290, provided might be acquired for the purposes of the "Adirondack park."

115 Under the franchise so acquired, the defendant was proceeding to extend its road through such counties, and to that end, on the 18th day of September, 1897, filed in the several counties in question a map and profile of its proposed route, and at once gave the requisite notice to the owners of the lands through which it passed. Such proposed route has never been changed.

At that time the State had not acquired any interest in the strip of land so located. There is no claim that it had either acquired a conveyance of, or taken any proceedings to condemn such strip prior to that date.

It is said in R. H. & L. R. R. Co. *vs.* N. Y., L. E. & W. R. R. Co., 44 Hun., 206–210, that when a railroad company has filed the map and given the notice required by the statute, it has thereby "acquired a vested and exclusive right to build, construct and operate a railroad on the line which it has adopted." And again, on page 211, it is said that such railroad company "has a franchise conferred upon it by the legislature to construct its road over the established line."

This case decided that the owner to whom such notice was given, and who had failed to obtain a change of the line, in the method provided by the statute, could not convey the land over which such line passed to a purchaser, or lessee, unaffected by the company's right to complete its title by condemnation, and thereafter to construct its road thereon. This decision was unanimously affirmed by the court of appeals, 110 N. Y., 128, and in that case, on page 133, the following language is used: "This right to locate its line of road, at its election, is delegated to the corporation by the

sovereign power; as is the right subsequently to acquire, *in invitum*, the right of way from the land-owner and any land needed for the operation of its road. * * * When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any land owner or occupant, in our judgment, it has acquired the right to construct and operate a railroad upon such line; exclusive in that respect as to all other railroad corporations and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings." See also Suburban Rapid Transit Co. *vs.* Mayor, etc., of N. Y., 128 N. Y., 510; Pocantico Water Works *vs.* Bird, 130 N. Y., 256.

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Upon the authority of these cases, it is clear that, as a purchaser, the State took, under the conveyance to it of the strip of land in question, no title except such as was subject to the right of the defendant to perfect, by condemnation proceedings, its title thereto. At the time the defendant filed its map and gave the notice above stated, the strip described therein was no part of the Adirondack park, nor the forest preserve. Until purchased or condemned, it was no part of such premises; and it never would become a part thereof, unless in the judgment of the proper commission it was deemed necessary for such purpose. When the commission, after concluding that it was necessary, attempted to procure the same, this strip had become impressed with the rights of the defendant, as above specified, and any conveyance which the owner could give, was subjected to that right. So far as the State claims under its deed, it stands simply as a purchaser. It acquires the rights which its grantor had no more; and as purchaser it can claim no more. By making the purchase and taking that conveyance the State was not exercising the right of eminent domain; it was simply acquiring by contract the title which the Indian River Company then had. No other rights than theirs were transferred, and no others were affected by such conveyance. It was upon this theory that a majority of the court concurred in the case of "Adirondack Railway Co. *vs.* Indian River Co., 27 App. Div., 326."

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Nor did the State acquire any greater interests in the lands by the condemnation proceedings which it claims to have instituted under the provisions of sections three and four of chapter 220 of the Laws of 1897.

Such proceedings were taken against the Indian River Company, only, and the notice required to be given by the fourth section of that act was given to that company only. No notice whatever was given to this defendant. No description of its rights in, or claim to the strip in question was mentioned or referred to in the certificate filed. No actual possession has ever been taken of this strip. Not a thing in the record indicates an intent to acquire or cut off the rights of the defendant in such strip; and the defendant has never

been in a position where, under the provisions of sections 5 and 6 of that act, it could ask damages against the State for any rights of which it has been deprived. The proceeding seems to have been to acquire the rights only which the Indian River Company had in the premises, and by such a proceeding the State has acquired no more than it did by its grant from the same company.

Clearly, under the decisions above cited the defendant had acquired property rights in that strip of land, which neither a conveyance from the owner, nor condemnation proceedings against such owner alone, could operate to cut off.

118 The question is not now presented to us whether the State may, under the exercise of its right of eminent domain, take from this defendant the rights which it has acquired in the strip of land in question, but whether it has as yet actually done so. In our judgment it has not.

When the strip of land in question was located by the appellant it passed through lands which were no part of the forest preserve. Hence no provision of the constitution, nor of any law, was applicable to prevent it, and when it was taken into that preserve, it was taken by the State subject to the rights which the appellant had then already impressed upon it.

We therefore conclude that no reason has been shown why the defendant is not entitled to proceed with the condemnation proceedings it has inaugurated. The judgment restraining it from so doing was erroneous and should be reversed.

Judgment reversed and a new trial granted, with costs to abide the event.

119 Appellate Division, Supreme Court, Third Department.

Parker, P. J.; Landon, Herrick, and Merwin, assoc. jsts.

ALBANY, *November*, 1898.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents, *against* THE ADIRONDACK RAILWAY CO., ETC., Appellants. } 23–33.

HERRICK, J., dissenting:

I cannot agree to the conclusion arrived at by the court in this case, nor in the reasons therefor contained in the opinion of the presiding justice, and the principles involved are so important that I feel constrained to express my views at some length.

In order to a complete understanding of the case, it seems to me that a somewhat fuller statement of facts is desirable than that contained in the prevailing opinion.

Section 7 of article 7 of the constitution provides as follows: "The lands of the State now owned or hereafter acquired, constituting the forest preserve, as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

120 What constitutes the forest preserve is defined by section 270 of chapter 395 of the Laws of 1895.

Section 290 of chapter 395 describes what lands shall constitute Adirondack park, and provides that "such park shall be forever reserved, maintained and cared for as ground open for the free use of the people for their health and pleasure, and as forest lands necessary to the preservation of the head waters of the chief rivers of the State, and a future timber supply; and shall remain part of the forest preserve."

The lands described in the description of what constitutes Adirondack park, embraces lands within the towns and counties theretofore included in the description of the forest preserve.

By chapter 220 of the Laws of 1897, there was constituted "the forest preserve board," whose duty it was made, and they were thereby authorized to acquire for the State by purchase or otherwise, such lands embraced within Adirondack park, as it might deem advisable for the interests of the State, and if they could not agree with the owners upon the value of the property, they were authorized to acquire it by proceedings therein prescribed. After the board had entered upon the discharge of its duties, a corporation known as the Indian River Company, together with a Mr. McEchron and others, offered to sell to such forest preserve board the whole of township No. 15, and 18,000 acres in township No. 32, of the Totten and Cross-Fields patent; which offer was accepted by the forest preserve board on the 6th day of August, 1897.

The lands so agreed to be sold and purchased were within the boundaries, and part of the forest preserve and Adirondack park. It appears that the parties offering to sell to the State did not own all the lands that they had agreed to convey, and while they were procuring title to the necessary lands in order to convey

121 them to the State, and before the delivery of a deed thereof to the State, and on the 18th day of September, 1897, the defendant, which is the railroad company, with a road maintained and operated from Saratoga Springs to the village of North Creek, in the county of Warren, and which desired to extend its road from North Creek to Long Lake, caused a map and profiles of its road from North Creek to Long Lake to be made, which map and profiles were duly certified to by the president and *and* engineer, and filed in the offices of the county clerks of the counties of Warren, Essex and Hamilton a portion of the route described in such map and profiles passed over the tract of land known as township 15, and over the land agreed to be sold to and purchased by the forest preserve board, as above set forth.

The defendant thereafter by complaint verified on the 29th day of September, 1897, commenced an action against the Indian River Company, McEchron and the other persons who had agreed to sell such lands to the forest preserve board, asking that they be restrained and enjoined from selling such portion of the lands aforesaid as was comprised within the route adopted by the defendant over said township No. 15, as shown on the map filed by them,

"except said conveyance be expressly made and received subject to the right of way thereover of the plaintiff (defendants') said road."

An injunction was granted restraining said persons from conveying such lands to the forest preserve board.

The order granting such injunction was appealed from to this court, and on or about the 2d day of March, 1898, this court reversed the order granting the injunction, and directed that it be dissolved.

In the meantime, and on the 6th day of October, 1897, the
122 Indian River Company deeded to the State the lands theretofore agreed to be sold to it through the forest preserve board, excepting that portion of those lands described in the map and survey filed by the defendant. On the same day, a deed of the lands described in said survey was drawn up and placed in escrow to be delivered when the injunction should be dissolved.

Upon the 7th day of October, 1897, the forest preserve board caused to be filed in the office of the secretary of state a description of the lands described in the map and profiles filed by the defendants as provided for by section 4 of chapter 220 of the Laws of 1897, and notice thereof was served upon the Indian River Company as the owner of such lands.

The statute provides that "from the time of such service the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified, shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be conclusive evidence of an entry and appropriation by the State."

The statute further provides that "claims for the value of the property taken and for damages caused by any such appropriation may be adjusted by the forest preserve board if the amount thereof can be agreed upon with the owners of the land appropriated." * * * "Upon making such agreement the board shall deliver to the owner a certificate stating the amount due to him on account of such appropriation of his lands, and a duplicate of such certificate shall also be delivered to the comptroller. The amount so fixed shall be paid by the treasurer upon the warrant of the comptroller."

Section 5.

123 SECTION 6. "If the forest preserve board is unable to agree with the owner for the value of the property so taken or appropriated, or on the damages resulting therefrom, such owner within two years after the service upon him of the notice of appropriation as above specified, may present to the Court of Claims a claim for the value of such land and for such damages, and the Court of Claims shall have jurisdiction to hear and determine such claim and render judgment thereon. Upon filing in the office of the comptroller a certified copy of the final judgment of the Court of Claims," * * * "the comptroller shall issue his warrant for the full amount due to the claimant, and such amount shall be paid by the treasurer."

On the 11th day of November, 1897, the forest preserve board paid to the Indian River Company the full amount of the pur-

chase-money under their contract for said lands, and upon the dissolution of the injunction, the deed held in escrow of the lands described by said map and profiles was delivered to the People of the State of New York, and thereafter recorded.

In the meantime, and before the payment of said purchase-money, and on the 7th day of October, 1897, the same day the forest preserve board filed its description of lands to be taken, but whether before or after such action is disputed, and it seems to me unnecessary to determine, the defendant began proceedings against the Indian River Company and others, to condemn the lands described in such map and profile, by serving upon one or more of the owners of said lands a petition for the condemnation of said lands, together with a notice of the time and place of its presentation to the court, the People of the State and the forest preserve board not being made parties to such proceedings.

124 Before such condemnation proceedings were terminated the action now under consideration was commenced for an injunction restraining the defendants from proceeding further.

It will thus be seen that before the defendant had filed its map and survey, the State had designated the territory through which such route ran, as a portion of the Adirondack park and forest preserve, and that the State through the forest preserve board had entered into a contract for the purchase of the specific lands in question, and that before proceedings had been commenced by application to the court by the defendant to condemn such land, the State had acquired the title thereto by deeds from the owner thereof, and also by appropriating the same in the manner provided by statute, and it thus became a part of Adirondack park and the forest preserve, which the constitution provides shall be inalienable.

It is contended, however, upon the part of the defendant, and that contention is sustained by Mr. Justice Parker in his opinion, that the defendant, by filing its map and survey, acquired a property or vested right which did not pass by the conveyance to the State or by its appropriation, and that whatever rights the State has acquired are subject to those of the defendant and subject to its right to acquire title to the land covered by such route and survey by condemnation proceedings.

While the State has the right to alter, modify, limit or entirely withdraw the franchise given to the defendant to operate a railroad, I will concede that where under such franchise it has acquired any property or vested right, that such property or vested right cannot be taken away from it, except by awarding compensation.

The mere privilege of acquiring property by the right of eminent domain granted to it by the State is not an absolute right, but one that it holds subordinate to the State, and which power

125 it cannot share with the State, nor be upon an equality with it in its exercise.

When the State elects to exercise the right of eminent domain in its own behalf, it is supreme; all other rights or privileges of a like character theretofore granted by it, must give way to it. It is a right it cannot part with, or bind itself not to exercise; and when

it attempts its exercise, no such question can arise between it and any corporation to whom it has granted the privilege of exercising a like power, as has frequently arisen between corporations, municipal or otherwise, as to who has the prior right. The only limitation upon its exercise that I can conceive of is when the corporation to whom has been granted the exercise of such right, has acquired property pursuant to it, such property cannot be taken away without just compensation; and in that respect it occupies the same position as the individual owner of property, each is under the equal protection of law. But before such corporation has exercised the power conferred upon it, and acquired property pursuant to it, it has no rights or privileges which it can set up as against the State; such power and privileges granted to it are held subordinate to, and subject to the right of the State to exercise this high prerogative at any time in its own behalf. This power is one of the attributes of sovereignty which the legislature cannot grant away or place the State upon an equality of exercise with, or in subordination to, any other corporation or being; it is a power of which it must at all times retain the free and unrestricted use.

This subject was heretofore discussed by me in the case of The Adirondack Railroad Co. *vs.* Indian River Railroad Co., 27 App. Div., 326, and I will not repeat or enlarge upon that discussion here.

It is contended, however, that before the State had acquired
126 any title or interest in these lands, that the rights of the defendant had become absolute and fixed by filing its map and plans, and the cases of R. H. & L. R. R. Co. *vs.* N. Y., L. E. & W. R. R. Co., 110 N. Y., 128; The S. R. T. Co. *vs.* Mayor, 128 N. Y., 510; and P. W. W. Co. *vs.* Bird *et al* o'rs, 130 N. Y., 256, are relied upon to sustain that contention.

It will be observed that none of those cases are cases where the State was a party; none of them are cases where the land-owner was a party; they were all cases between contending corporations upon whom had been conferred the power of eminent domain, and the real question decided was, that the corporation first filing its map and survey acquired as against the others an exclusive right to the use of such land for corporation purposes; that was all that was decided in any of those cases, and in none of them was it necessary to decide, nor was it decided, that by so filing the map and survey the corporation acquired any interest in or title to the land described therein.

The judges writing the opinions in those cases, as frequently occurs, used language and expressed opinions not necessary for a decision of the questions involved, which leads to some embarrassment; for instance, in the case of The R. H. & L. R. R. Co. *vs.* N. Y., L. E. & W. R. R. Co., 44 Hun., 206–210, the judge said "that by filing its map and plans, and giving notice the corporation acquired a vested and exclusive right to build, construct and operate a railroad on the line which it has adopted." And again in the same case upon appeal, in the court of appeals, 110 N. Y., on page 133, the judge writing the opinion said: "This right to locate its line or

road, at its election, is delegated to the corporation by the sovereign power; as is the right subsequently to acquire, *in invitum*,
127 the right of way from the land-owner, and any land needed for the operation of its road."

* * * "When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any land-owner or occupant, in our judgment, it has acquired the right to construct and operate a railroad upon such line; exclusive in that respect as to all other railroad corporations, and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings."

Of course if the language used in the several opinions in the cases referred to is to be taken literally, all discussion of this question is ended; and it must be considered as established law, that the legislature has power to confer upon a corporation the right to take from a man without notice, and without compensation, the most valuable element of his property, his right to freely dispose of it. That a corporation can of its own motion, without application to the courts, absolutely forbid the sale or disposition of a man's property. Can for an indefinite period of time tie it up in his hands, and compel him to hold it until such corporation gets ready to take possession of it upon the payment of such an amount as it chooses to offer, or third parties, (commissioners) say shall be paid for it, or transfer it subject to the same burden. Can place an incumbrance upon it that depreciates it in value, that prevents its free sale. That when he has agreed upon its sale, and the sale of the whole of it,
128 and all interest *it* it, can by its own absolute fiat, by merely filing a statement of what it wants, absolutely prohibit its sale.

All this is so contrary to fundamental principles, repeatedly recognized by the court of appeals, that I refuse to believe that it intended to so decide.

As a general rule the court only passes upon what is necessary in order to decide the case before it.

It will be observed that the language of the opinions, in the cases referred to, goes much further than was necessary for the decisions of those cases.

Take the case of The R. H. & L. R. R. Co. *vs.* N. Y., L. E. & W. R. R. Co. (*supra*) as an illustration. The only parties before the court were the two railroad corporations, the only question necessary to be decided was, which had precedence. It was not necessary to determine that no one else could interfere with the rights or proceedings of the corporation which had filed its map and survey, nor was it necessary to determine that it had an absolute right to construct and operate a railroad upon the line described in such map and survey, nor that it had acquired a lien as against any other person or corporation than the competing corporation, which had subsequently filed its map and survey.

Neither the State, nor the owners of property were before the court in any of those cases. Neither had an opportunity to be heard. The rights of neither were considered. And the opinions were written evidently without considering how their language might affect the rights of the State or property-owners.

In determining the force and effect to be given to the language of an opinion, we should bear in mind what was said by the court in the case of The C., C. T. Co. *vs.* K. R. R. Co., 154 N. Y., 493,
129 "If as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, *that* are the dicta of the writer of the opinion, and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance."

The question before the court in those cases was not the general question as to what rights had been acquired by the corporations filing maps and surveys of the lands they desired to appropriate, but simply what rights they had acquired as against other corporations, to whom had been granted similar powers.

The questions to be decided in this case, however, are questions arising between the defendant and the State, and between the defendant and the owners of the lands described in the defendant's map and profile, not questions between the defendant and any other corporation. We are called upon to determine whether the defendant had acquired any such interest in such lands as against the owners, as would prevent their conveying them free and clear of all liens or encumbrances.

It becomes necessary then to discuss whether by filing its map and survey the defendant acquired any vested or property right in or to the lands in question.

If it obtained any interest in or to the lands in question, it must have been from, or in derogation of the rights or interest of the former owner.

It had not acquired title to the land or a right to the possession thereof; these could only be acquired after it had taken proceedings to condemn the land, and had paid the owner for it (Code of Civil Proc., sections 3371 and 3373). As between the land owner
130 and the corporation, no rights had become fixed or vested.

The rights of the respective parties, that is, the land-owner and the railroad company, do not become fixed until they have progressed so far as to give mutual rights, that is, until the confirmation of the report, when the land-owner becomes entitled to the compensation or damages fixed by the commissioners in their report, and the railroad company becomes entitled to the land upon the payment of such compensation or damages.

Matter of Rhinebeck & Conn. R. R. Co., 67 N. Y., 242.

Corporation of City of New York *vs.* Mapes, 6 John. Chan., 49.

Corporation of City of New York, 18 Johnson, 506.

Until that time no rights are vested in either party.

In the cases of Corporation of City of New York, 18 Johnson, 506, and Corporation of City of New York *vs.* Mapes, 6 John Chan., 49, it was held that no rights became vested before the appointment of commissioners to appraise the damages, but those cases left it open to be inferred that the rights of the parties became vested upon the appointment of such commissioners. Subsequently, in the case of The People *vs.* Brooklyn, 1 Wend., 319, the court upon reviewing those and other cases, held that the rights of the parties did not become fixed and vested until the confirmation of the report of such commissioners, that up to the time the report was made, the party seeking to condemn could not know the amount that they would have to pay for the land, and, therefore, could not tell whether they would wish to proceed, and that up to that time the court had the right to permit them to discontinue, but
131 after the report had been confirmed, then for the first time the rights of the parties became fixed and vested. See also the same effect in the Matter of Canal Street, 11 Wend., 154, and Matter of Anthony Street, 20 Wend., 620.

In the Matter of Commissioners of Washington Park, 56 N. Y., 144, where the park commissioners had caused a map of the lands to be taken to be filed, had passed resolutions that it was necessary to take such lands; commissioners of appraisal had been appointed, hearings had been had, the commissioners had made and were ready to file the report, when the park commissioners obtained an order staying the filing of the report, and staying the owners from taking any proceedings.

Subsequently, leave to discontinue was granted upon payment by the park commissioners to the land-owners, the parties to the proceedings, of their necessary and reasonable costs and expenses incurred upon the appraisement of damages. This order permitting them to discontinue was sustained by the court of appeals upon the ground that neither party had acquired any vested rights, that until the report of the appraisers was confirmed, the board of commissioners of Washington park had not acquired any title to the property, and no rights for compensation had become vested in the property-owners.

This case was approved in the Matter of Military Parade Ground, 60 N. Y., 319, where it was held that no title to lands was acquired simply by making and filing a map, plan or survey, under an act which conferred upon the department of public works, the rights to lay out and establish a parade ground, and which provided that the department of public works should cause a map to be made, showing the locality and the extent of the same, and certified by them, which was to be filed as directed; and from and after
132 the filing of such map, the ground so described should become one of the public squares or places, and public streets and avenues in the city; and provides in another part for the appointment of appraisers to assess the damages; and it was held that until the confirmation of the report of the commissioners of estimate and assessment appointed to make such assessments, the title to the

lands did not pass to the city, but remained in the owners with full power to exercise entire control over it, subject only to the right of the city to acquire title according to law. And that independent of the statute which authorized the park commissioners to discontinue proceedings, that under the authority of the case of the "Commissioners of Washington Park" (*supra*), the court had power to permit them to discontinue at any time before the confirmation of the report of the commissioners of estimate and assessment.

If the defendant, then, had neither the title nor the right to the possession of the land, what interest did it have in it? If it had acquired by merely filing the map and survey some interest in it, which the owner could not thereafter convey away, then it acquired that interest without notice and without compensating or providing for compensating the owner.

If it was a property right in the land, then the owner could not be arbitrarily deprived of it without adequate compensation.

The mere filing of the map and profile or survey, which is done without notice to any one, did not constitute a lien or incumbrance upon the land as against the owner; to hold that it did would be in contravention of that principle which forbids that a man shall be deprived of any of his rights without an opportunity to be heard.

It would be taking private property without compensation.

133 One of the most valuable attributes of property is the right to freely sell it. Any lien upon it is a restraint upon its sale, a cloud and encumbrance upon it, which necessarily interferes with its sale; it is a depreciation of some of its value.

"Salability is an essential element of property, and the destruction or diminution thereof is a taking of property that cannot be done except through the exercise of the right of eminent domain or of the police power."

Ingersoll *vs.* Nassau Electric R. R. Co., 157 N. Y., 453–'63.

"The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution, save only by the law of the land."

First Blackstone's Commentaries, 138.

"Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the constitution, that it must, in terms or in effect, authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner."

Forster *vs.* Scott, 136 N. Y., 577–585.

In the case last cited the court held that portion of a statute
which declared that no compensation should be allowed to
134 the owner of land taken for a street, for any building erected
thereon after the filing of a map of the proposed street, to be unconstitutional, as taking property without compensation.

To the same effect is the case of German Am. Real Estate Co. *vs.* Myers, 32 App. Div., 41.

To hold that the defendant by merely filing its map and profiles procured a lien and placed an encumbrance upon the land would be to hold that an owner can be deprived of the free use and enjoyment of his property, and of his right to freely sell and alienate it without due process of law, without notice or an opportunity to be heard.

An opportunity to the citizen to test before the proper branch of our Government the legality of the taking of his property, is and must ever remain a necessary part of that "due process of law" guaranteed him by the constitution. As was said by Jackson, C. J., in Scott *vs.* City of Toledo, 36 Fed. Rep., 397 (1888): "The owner must in some form, in some tribunal or before some official authorized to correct errors or mistakes, have an opportunity afforded him to be heard in respect to the proceeding under which his property is to be taken or burdened * * * in order to constitute such procedure 'due process of law.'"

And the same principle is recognized and stated in—

People *vs.* Supervisors, 70 N. Y., 234 (1877).
Stuart *vs.* Palmer, 74 N. Y., 183 (1878).
People *vs.* Turner, 117 N. Y., 236 (1889).
Spencer *vs.* Merchant, 125 U. S., 356 (1887).
Davidson *vs.* New Orleans, 96 U. S., 104 (1877).
Kentucky Railroad Tax Cases, 115 U. S., 331 (1885).

135 Under the statute in this case, the owner may or may not have an opportunity to be heard. The statute does not require notice to be given to the owner of the property. It requires notice to be given only to the occupant.

Section 6 of chapter 565 of the Laws of 1890.

If within fifteen days after the filing of the map the owner acquires knowledge of its filing, he may apply to a justice of the supreme court to have the route altered, that is, to have this lien upon his land removed. It will thus be observed, that he has no opportunity to be heard upon the question as to whether a lien shall be placed upon his land, but an opportunity only to take steps to have it removed.

All the rights that the defendant has are under the statute and section referred to, and it is not sufficient that in a particular case the owner, as a matter of fact has notice served upon him, the statute does not require such notice, and if it is a valid statute, this lien can be acquired without serving any notice upon the owner at all, and without the owner ever having received any notice or knowledge of the proceeding until after, under the statute, it is too

late for him to take any proceeding to remove the lien by changing the route.

And it is familiar law that a statute is to be tested not by what has been done under it, but by what may by its authority be done.

A lien upon real estate under which an owner may ultimately be deprived of his property therein, cannot be obtained without notice to such owner.

In the case of Stuart *vs.* Palmer, 74 N. Y., 183, which was the case of an assessment for a public improvement, and which assessment when made was declared by the statute to be a lien upon the land so assessed, and where the statute made no provision
136 for notice to be given, the court said, "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

This case has been repeatedly approved of by the court of appeals, and is now perhaps the leading authority in this State upon the principle involved.

The statute in this case not having required notice of the filing of the map and profile to be given to the owner of the land, no lien or encumbrance could be validly imposed upon it by authority of its provisions, and it follows therefore that the defendant did not by filing its map and profile obtain any property right or interest in the land as against the owner, which would prevent such owner from conveying it free and clear to the State.

It is claimed, however, that by virtue of its franchise, the defendant has obtained a vested right to build a road over the route in question which cannot be taken away from it.

The error in that assumption arises, it seems to me, from a failure to appreciate what its franchise means, and what is granted by it.

Its franchise, as such, is simply the privilege to exist as a corporation: a privilege granted to individuals to act together as one, with the right of successions: together with the powers
137 granted to enable such body to carry into effect the purposes of the organization, and the property it acquires by virtue of such privilege is separate and distinct from the privilege of franchise itself.

In this State individuals cannot of common right combine together to build and operate a railroad, to do so is a privilege granted by the State.

And by making and filing its articles of incorporation under the statute, the corporation so formed, obtains no property or vested right, except the mere right to exercise corporate functions, the right to existence as a corporation.

It has thereby obtained no right, upon its own motion, to appropriate lands, or an interest in them. The courts have repeatedly held that by the general railroad law, the legislature has not delegated to railroad corporations the power of determining what lands are necessary to be appropriated to their use for the purposes of their incorporation, but that under the statute it is for the courts to determine upon the application of a railroad company the question of the necessity and extent of the appropriation.

See R. & S. R. R. Co. *vs.* Davis, 43 N. Y., 137;
R. & S. R. R. Co. *vs.* Davis, 55 N. Y., 145;
Matter of N. Y. C. R. R. Co., 66 N. Y., 407.

They are simply given the power to acquire lands by purchase, or, in the event of failing to agree with the land-owners, to acquire them under the right of eminent domain by application to the courts.

While a railroad corporation is formed for the declared purpose of building a railroad through a specified portion of the State, no right is conferred upon it to do so; what is given to it, is not the right to build its road through such portion of the State, but
138 the capacity to acquire the right from those owning the land over which such route proceeds.

This was well stated by Chief Justice Ruger in the case of The People *vs.* O'Brien, 111 N. Y., 1–30. In that case the corporation was a street railroad company organized under chapter 252 of the Laws of 1884, which provides for the incorporation of street surface railroads, and requires amongst other things, that the articles of association shall state the names of the cities, towns and villages, and the counties, together with the names of and descriptions of the streets, avenues and highways through which it is proposed to construct the road, and the chief justice in his opinion states, "By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct and operate a railroad upon the streets of any municipality. This right, under the constitution, could be acquired only from the city authorities, who could grant or refuse it at their pleasure."

So in the case of the defendant by its articles of association, while they described the localities through which it proposed to build the road, it acquired no present authority or right to construct the road through such localities, but merely the power or capacity to acquire the right from the owner or owners of the soil; as in the case of the street railroad company, it had to acquire that right from the municipal authorities who owned the streets through which it proposed to construct its route, and until it acquired such right, it acquired no property in such route.

139 The constitution equally protects the municipality in its streets, and the land-owner in his property. And in the event of the railroad corporation failing to obtain the consent of

either to its use, application may be made to the courts to obtain the necessary rights, and when so obtained they become property.

The fact that by being authorized to build a railroad, between prescribed points in the State, and to file a map of its proposed route, and by so doing, such road acquires no title to or property in the land so described in such map even as against the State which conferred the right to build its road over such course, is illustrated by the case of The N. Y. C. & H. R. R. R. Co. *vs.* Aldridge, 133 N. Y., 83.

The Hudson River R. R. Co. was incorporated under chapter 216 of the Laws of 1846 for the purpose of constructing a railroad along the east side of the Hudson river from New York to Albany; subsequently, it was consolidated with the New York Central R. R. Co. By chapter 30 of the Laws of 1848, the legislature amended the act of 1846, and by section 5 of such amendment it gave power to the directors of the railroad company to alter the location of their road, and adopt a new one in its place, as a substitute for the old location; a map of the course as altered was to be filed in accordance with the provisions of that section.

In 1868, the company under the amendment of 1848 modified its location and altered its line and filed a map thereof as provided by law; subsequently, it made additional alterations and modifications, and made a map thereof. By virtue of these statutes and by the filing of its maps indicating the course upon which it intended to lay out and operate its road, it claimed to have obtained title
140 to certain lands under the waters of the Hudson river. The court held that neither by the acts of the legislature, nor by filing its maps did the railroad obtain any title to the land in question. "The land was to be acquired subsequently. As to lands belonging to individuals the company secured no title by selecting and adopting a course and filing a map, it still had to purchase such lands or else obtain them by the exercise of the right of eminent domain, there is no provision in the law which makes a different result where the lands belong to the State."

In the case of Archibald *vs.* N. Y. C. & H. R. R. R. Co., 157 N. Y., 574, where the same railroad company, under the same statute, had filed its map and proceeded to fill in a parcel of land under water, and thus reclaimed the land in controversy, the court held that it had acquired no title to the land in that way, or by indicating the parcel upon the map, and that "the railroad company could not acquire title to the land under water by taking possession of it and filling it up. The title still remained in the State, and the grant from the sovereign to the owner of the adjoining upland would carry title to him."

It will be observed that that case is in many respects a much stronger one in favor of the railroad company than the one at bar. There, pursuant to its charter and the act of the legislature, it had filed its map of its proposed route, running over lands of the State under water; it had filled in such lands; had expended money and labor in creating, so to speak, the tract of land in question, and yet it was held that the State, as the owner of the title, could convey such

lands to an individual and that such individual acquired a title thereby superior to that of the railroad, and could maintain an action against it to recover the possession thereof, and eject the railroad therefrom, and the only reason that the defendant was
141 not actually ejected but permitted to occupy it in common with the plaintiff, was, that during the pendency of the action it had procured the title of the plaintiff's cojoint tenants in such land.

If under such circumstances the State can convey title to land, upon which it has at least given the railroad company a license to enter and use, with the power to acquire title to it, how much stronger is the right of an individual property-owner to convey his property, which has been described in the map, upon which no money has been expended, and as to which he has granted to the railroad company no rights of any kind whatever. If the State in the one case can give title free and clear to its grantee, notwithstanding the laying out of the route and filing a map by its permission, and the expenditure of its money pursuant to such permission, why should not an individual owner exercise the same power and authority over his land? If no property right has been acquired in the one case, none has been acquired in the other. The utmost that has been acquired is the right to obtain property.

There is a plain distinction between the franchise to be a corporation, and the property acquired under such franchise. One can be altered, taken away or destroyed, the latter cannot be without compensation.

The case of The People *vs.* O'Brien (*supra*), which is the leading and strongest authority in this State upholding the sacredness and inviolability of corporate property rights, recognizes this distinction; while it held that it was not within the power of the legislature to destroy the property rights of a corporation acquired under its franchise, it was not questioned that the legislature could destroy the existence of the corporation itself.

Schurz *vs.* Cook, 148 U. S., 410.

142 The mere privilege to act as a corporation, the so called franchise, lacks one of the essential elements of property, it cannot be sold or alienated, except by express provision of some statute; at common law, it is not transferable, nor can it be sold upon execution.

Thompson on Corporations, sections 5352, 5353.
Morawitz on Private Corporations, section 924.

I repeat that all that the defendant acquired by its articles of association or incorporation was the power or capacity to acquire the right from the people owning the land to construct its road over such land, and that such power or capacity was not property or a vested right, but merely the privilege to acquire property or vested rights, and that this capacity or power so conferred upon it is not in and of itself property; if it was it could not be taken away without compensation, and the courts have uniformly held that such

power can be taken away from it without compensation, although the property that it has acquired pursuant to such power cannot be.

In the case of Pearsall *vs.* Great N. R. R. Co., 161 U. S., 646, the court cited with approval Mr. Justice Cooley's definition of vested rights, that is, that "rights are vested in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting."

Cooley's Principles of Const. Law, 332.

143 Accordingly, it was held in that case "That a clause in a charter of a railroad corporation granting it certain powers to consolidate with or become the owner of other railroads was not such a vested right that it could not be rendered inoperative by a subsequent statute passed before the company had availed itself of this power granted by a former statute."

This was approved in Bank of Galveston *vs.* Tennessee, 163 U. S., 416, and Galveston Railroad Co. *vs.* Texas, 170 U. S., 226, and I can see no distinction between the principle of those cases and of one where a railroad has the privilege to extend its route by the purchase or condemnation of lands, as long as it has not exercised that privilege and acquired the land.

The filing of the map under the definition above given of a vested right, could not create a vested right. As was said in Forster *vs.* Scott (*supra*), the corporation "might or might not appropriate the land according to their pleasure, notwithstanding the filing of the map;" or the court might or might — hold it to be necessary for the defendant's purposes.

In this case the land in question had not been acquired either by executed contracts or by condemnation proceedings; nothing had been acquired from the owners; nothing had been taken away from them that pertained to their title or ownership; the most that can be said is, that the defendant had taken the first steps in proceedings which might or might not, continued to the end, result in acquiring property. It was a right which could only come into existence on an event or condition which might not happen or be performed, until some other event might prevent its vesting; and the defendant, as was said in People *vs.* O'Brien (*supra*), had "no present authority to construct and operate a railroad over the land
144 in question; before it could do so it had to condemn it and pay for it, and therefore under the definition above given, as to what constitutes a vested right, the defendant had only a contingent interest, not a vested right, and such an interest is not property, and is not within the protection of the Constitution."

There are some cases holding that any act or proceeding which prevents the corporation from fulfilling the purpose for which it

was formed, is practically a destruction of that corporation and its franchise, and therefore a taking of a right or thing of value. This, however, is not such a case. The defendant is not prevented from exercising its powers under its franchises, by having its entire route taken away from it, and thus being unable to do that which it was organized to do, because it appears that the corporation is already owning and operating a road, and this proposed route is merely an extension of one already in existence; and if it does not obtain the route in question, it will still be an existing and operating road as it has been for a number of years.

In that respect it is like the case of Pearsall *vs.* Great N. R. R. Co. (*supra*), which had the right to extend its route by consolidating with, leasing or purchasing other roads, which right as we have seen, the court held not to be property or vested right, and therefore it could be taken away from it prior to its becoming possessed of such other roads by consolidation, lease or purchase.

Nor does it appear that the route in question is necessary to connect with any other portion of the road already constructed, nor that it is a necessary route to make a through line; that is, it does not appear that some other route may not be adopted which will answer the same purpose, therefore the interfering with it or
145 preventing its taking such route, is not a practical destruction of its corporate franchise.

I refrain from discussing the question raised as to the constitutionality of the provisions of the statute providing for the taking of lands by the forest preserve board, for the reason that when the State entered into the contract to purchase, the defendant had no property right in the premises neither had it when the purchase was completed or the appropriation made, so that as to it, no constitutional question can arise as to taking property without notice or hearing, and that question therefore cannot be raised by it.

One whose rights are not affected by the constitutionality of a law, cannot raise that question.

At the time the defendant instituted its proceedings to condemn the premises in question, it knew of the action of the State, and therefore could take nothing by such proceedings.

If I am right in my conclusion that the defendant acquired no interest in the land as against the land-owner that would prevent his conveying it to the State free and clear of any lien or encumbrance, then such land became at once subject to the provisions of section 7, article 7, of the constitution, and there is no occasion to consider the effect of its filing a description of the lands to be taken as provided for by section 4 of chapter 220 of the Laws of 1897. If it by any means, whether by purchase or condemnation, acquired the land in question for public purposes, they cannot, nor can any intent in them, be taken away from it.

The judgment should therefore be affirmed.

146 Whereupon the court of appeals, having heard this cause argued by Edward Winslow Paige, Esq., of counsel for the appellant, and Lewis E. Carr, Esq., and R. Burnham Moffat, Esq.

of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of said appellate division should be reversed and the judgment entered upon the decision of the special term affirmed, with costs.

Therefore it is considered that the said order be in all things affirmed, with costs, as aforesaid, and stand in full force, strength, and effect.

Thereupon the following opinion of the court was handed down herein:

147 THE PEOPLE OF THE STATE OF NEW YORK, Appellant,
v.
THE ADIRONDACK RAILWAY COMPANY, Respondent, Impleaded with the Indian River Company *et al.*

(Decided October 3, 1899.)

Appeal from an order of the appellate division of the supreme court in the third judicial department reversing a judgment in favor of the plaintiff entered upon the decision of the court at special term.

Edward Winslow Paige, for appellant.
Lewis E. Carr and R. Burnham Moffat, for respondent.

VANN, *J.*:

In 1882 the Adirondack Railway Company was incorporated for the term of one thousand years to construct and operate a railroad from Saratoga Springs to the River St. Lawrence, near the city of Ogdensburg. It was a reorganization of an older corporation known as the Adirondack Company, which was organized in 1863, under the provisions of chapter 236 of the laws of that year. Prior to the foreclosure which resulted in the reorganization, the Adirondack Company had constructed a railroad from Saratoga Springs to North Creek, in the county of Warren, and this railroad, together with the right to extend the same, became the property of the Adirondack Railway Company, which, in April, 1892, applied to the railroad commissioners for a certificate, under chapter 565 of the Laws of 1890, to relieve it from the statutory obligation of extending its lines; on the 9th of May following, the commissioners issued their certificate accordingly. The Adirondack Railway Company, thenceforth called the defendant, made no attempt to extend its road until the early part of 1897, when a survey was made for a proposed extension from North Creek through the counties of Warren, Hamilton and Essex, to the outlet of Long lake in Hamilton county, where it was expected that, by connecting with other roads, a route would be secured to the St. Lawrence river. Before anything further was done to extend the road, certain action, taken by the State, should be briefly alluded to.

In 1885 the forest preserve was created by statute, embracing "all the lands now owned, or which may be hereafter acquired by the State of New York within" certain counties, and the area was ex-

tended by subsequent legislation. (L. 1885, ch. 283; L. 1887, ch. 639; L. 1893, ch. 332.) These acts required said lands to be forever kept as wild forest lands, and provided that they should not be sold, leased or taken by any corporation, public or private. A forest commission with appropriate powers was created to care for the forest preserve, and appropriations were made from time to time to enable it to properly discharge its duties.

In 1890 the forest commission was authorized to "purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a State park," and in
148 1892 the Adirondack park was established and placed under the control of said commission. (L. 1890, ch. 37; L. 1892, ch. 707.)

The revised constitution, which went into effect on the 1st of January, 1895, provides that "the lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed." (Const., art. 7, § 7.)

In 1895, the legislation relating to the forest preserve and the Adirondack park was extended by the fisheries, game and forest law, and it was declared by section 290 that "such park shall be forever reserved, maintained and cared for as ground open for the free use of all the people for their health and pleasure and as forest lands necessary to the preservation of the headwaters of the chief rivers of the State, and a future timber supply; and shall remain part of the forest preserve." (L. 1895, ch. 395, §§ 270, 295.) During the same year the forest commission was authorized to purchase 80,000 acres for the use of the Adirondack park. (L. 1895, ch. 561.) In 1897 an act was passed, the object of which, according to its title, was "to provide for the acquisition of land in the territory embraced in the Adirondack park, and making an appropriation therefor." (L. 1897, ch. 220.) By this act the appointment of a forest preserve board was authorized, and it was made its duty "to acquire for the State, by purchase or otherwise, land, structures or waters, or such portion thereof in the territory embraced in the Adirondack park, as defined and limited by the fisheries, game and forest law, as it may deem advisable for the interests of the State." Section 3 of said act provides that "the forest preserve board may enter on and take possession of any land, structures and waters in the territory embraced in the Adirondack park, the appropriation of which in its judgment shall be necessary for the purposes specified in section 290 of the fisheries, game and forest law, and in section 7 of article 7 of the constitution." It is provided by the next section that "upon the request of the forest preserve board an accurate description of such lands so to be appropriated shall be made by the State engineer and surveyor, or the superintendent of the State land survey, and certified by him to be correct, and such board or a majority thereof shall indorse on such description a certificate stating that the lands described therein have been appropriated

by the State for the purpose of making them a part of the Adirondack park; and such description and certificate shall be filed in the office of the secretary of state. The forest preserve board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing of such description, and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service, the entry upon and appropriation by the State of the real property described in such notice for the
149 uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be conclusive evidence of an entry and appropriation by the State. (§ 4.) Provision is made by the next section for the payment for lands so taken and for damages resulting from the appropriation by agreement with the owner and the delivery of a certificate payable by the State treasurer upon the warrant of the comptroller. (§ 5.) If the forest preserve board is unable to agree with the owner upon the value of the property appropriated, the owner, within two years after the service upon him of the notice of appropriation, may present a claim for the value of the land to the Court of Claims, which has jurisdiction to hear and determine the same and to render judgment thereon. The amount of the final judgment is payable to the treasurer upon the warrant of the comptroller. (§ 6.) No provision is made by the act for the payment of any lien upon the lands except that when a judgment for damages is rendered and it appears that there is a lien or incumbrance upon the property appropriated, the amount thereof shall be stated in the judgment and the comptroller may deposit the amount awarded in the proper bank to be paid and distributed to the persons entitled to the same as directed by the judgment. (§ 19.) The sum of $600,000 was appropriated for the purposes specified in the act, and the comptroller was authorized to borrow $400,000 more upon the request of the forest preserve board to be expended under its direction.

On the 6th of August, 1897, after certain negotiations with the owners of a part of an extensive tract of land known as the Totten & Crossfield purchase, the forest preserve board passed a resolution accepting the offer of the owners of about 18,000 acres of township 23, and 32,000 acres of township 15 of that purchase for the sum of $149,000, of which $99,000 was for the land and $50,000 was for certain improvements at Indian lake for the use of the State, to be made in accordance with the plans and specifications to be furnished by the State engineer. Township 15 of the Totten & Crossfield purchase lies, as is admitted in the answer, "wholly within the bounds of the forest preserve and also of the Adirondack park." Upon the 15th of August, 1897, a representative of the State engineer with a surveying party began surveying at Indian lake for the purpose of constructing a dam at its mouth in order to stow water for the use of the Champlain canal and for water power on the Hudson river. Upon the completion of the survey plans and speci-

fications were prepared and the construction of the dam was commenced.

September 18th, 1897, the defendant caused a map and profile to be filed in the counties of Hamilton, Warren and Essex for the extension of its road across township 15, which the forest preserve board had agreed to purchase as aforesaid, and which lies partly in each of said three counties. It also gave notice of such filing to the occupants as required by statute, but did nothing else. About the 1st of October following, as the owners were about to convey to the State the lands covered by the resolution of August 6th, and receive their money, they were restrained from so doing by an injunction issued in an action brought by the Adirondack Railway Company against them. Thereupon they placed the deed *in escrow* to be delivered when the injunction was dissolved, made another deed embracing the same premises, except the land described in the railroad survey, delivered it to the forest preserve board, and received the $99,000, according to agreement. Immediate steps were taken to vacate the injunction, but they were not at first successful, and on the 7th of October the forest preserve board met, and learning that the justice who granted the injunction had declined to vacate it, they took steps to appropriate the land in question for a park under the power of eminent domain. The State engineer having furnished a description in writing of the six-rod strip, which the defendant desires for a railroad, and certified that the same was correct, the three members of the forest preserve board, acting under chapter 220 of the Laws of 1897, annexed thereto a certificate of condemnation and signed the same as the forest preserve board, in these words: "State of New York, county of Albany, city of Albany, *ss.* We, Timothy L. Woodruff, Charles H. Babcock and Campbell W. Adams, being the forest preserve board, acting under and in pursuance to an act of the legislature of the State of New York, being chapter 220 of the Laws of 1897, entitled 'An act to provide for the acquisition of land in the territory embraced in the Adirondack park and making an appropriation therefor,' do hereby certify that the lands in township 15, Totten & Crossfield purchase, in the counties of Hamilton, Essex and Warren, of the State of New York, described in the foregoing certificate of the State engineer, have been and hereby are duly appropriated by the State of New York for the purpose of making them a part of the Adirondack park." These papers, indorsed "State engineer's certificate and description and forest preserve board's certificate of condemnation," were filed in the office of the secretary of state on the 7th of October, 1897. On the same day a notice of this action of the board, with a general description of the property appropriated and a copy of the papers above mentioned, were served on William McEchron, the president of the Indian River Company, which then owned the lands involved. This service was made, as the special term is presumed to have found, at ten minutes before noon. On the same day the defendant began proceedings to condemn said strip for the purpose of extending its railroad, but as the special term is also presumed to have found, they did not file the

lis pendens until afternoon, and hence not until after the aforesaid proceeding in behalf of the State had been completed. No notice of condemnation was served on the defendant.

On the 2nd of March, 1898, the injunction restraining the conveyance of said lands to the State was reversed on appeal by the appellate division, and thereupon the original deed *in escrow*
151 was delivered and recorded. The defendant went on with its condemnation proceedings until it was restrained by a temporary injunction granted in this action, which was brought to restrain that company and the other defendants from further continuing the proceedings to condemn.

The defendant alone answered, and after a trial the special term rendered judgment for the People, perpetually enjoining it from taking the land. Upon appeal the judgment was reversed by the appellate division and a new trial ordered, by a divided vote, upon the ground that the company, by the filing of its map on the 18th of September, had impressed upon the land a lien that was good as against the State of New York. The People have appealed to this court, giving the usual stipulation for judgment absolute.

From the form of the decision of the special term, which did not separately state the facts found, and of the appellate division, which did not state that the judgment was reversed upon a question of fact, it must be presumed that all the facts warranted by the evidence and necessary to support the judgment were found by the special term, and that the reversal by the appellate division was based wholly upon errors of law, the facts standing approved by that court (Petrie *v.* Hamilton College, 158 N. Y., 458, 463; Code Civ. Pro., §§ 1022, 1338). For the purpose of this appeal, therefore, we must assume that the condemnation proceedings instituted by the forest preserve board were fully completed, as required by the statute of 1897, before proceedings to condemn on its part were commenced by the defendant. Hence, if the condemnation act of 1897, under which the forest preserve board acted, is in all respects a valid and binding law, title to the strip of land in question passed to the State before the defendant began the proceedings sought to be restrained in this action. The moment the title passed, said land became a part of the forest preserve, and thereupon the constitution spoke and commanded that it should not "be taken by any corporation, public or private" (art. 7, § 7). If the State, at any time and by any method, became the lawful owner, whether legal or equitable, of the land in question, *eo instanti*, this general and sweeping command of the fundamental law was addressed to the defendant, and rendered unlawful every effort at condemnation of that land on its part. Whether the State became the equitable owner through contract, possession and performance, we shall not discuss, as we think it became the legal owner through the power of eminent domain.

The defendant does not attack the regularity of procedure on the part of the State, but contends that the act, under which the State proceeded, is void, because it violates both the Federal and State constitutions. Its more specific contention is that said act is unconstitutional, because it authorizes the seizure by the State of private

property without due process of law, and without making compensation therefor.

Due process of law, sometimes called the law of the land, is not defined by either constitution, or by any statute, and
152 judges of the highest standing and widest experience, in various jurisdictions, have pronounced it incapable of definition, so exact as to fit all cases, and attempts to define have usually been confined to the facts of the case in hand. (Bertholf *v.* O'Reilly, 74 N. Y., 509, 519; Davidson *v.* New Orleans, 96 U. S., 97, 104.) While to a reasonable extent it may be regulated by a statute, ordinarily it rests upon established custom, and a method of procedure having the sanction of settled usage is commonly regarded as due process of law. It does not necessarily mean a judicial proceeding, for a man may be lawfully deprived of his property through the power of taxation, or of the use of his property through the police power without the intervention of any court. (MacMillan *v.* Anderson, 95 U. S., 37, 41.) In many cases due process of law is wanting when there is no opportunity for the person whose rights are affected to be heard, but this does not apply to the taking of private property by the State for public use through the power of eminent domain, except as to the subject of compensation, unless some statute requires a hearing. (Cooley's Const. Lim., 356.)

The power of taxation, the police power and the power of eminent domain, underlie the Constitution and rest upon necessity, because there can be no effective government without them. They are not conferred by the Constitution, but exist because the State exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the State as sovereign. While they may be limited and regulated by the Constitution, they exist independently of it as a necessary attribute of sovereignty. They belong to the State because it is sovereign, and they are a necessity of government. The State cannot surrender them, because it cannot surrender a sovereign power. It cannot be a State without them. They are as enduring and indestructible as the State itself. (Black Cons. Law, § 123; Cooley Const. Lim., 524; Eminent Domain by Randolph, 77; Lewis, § 3; Mills, § 11.) Each is a peculiar power, wholly independent of the others, and not one of them requires the intervention of a court for effective action by the State. In the case of eminent domain, when the State is not itself an actor, compensation for property taken, unless the amount is agreed upon, can be ascertained only through the aid of a court, but otherwise judicial action is unnecessary except as provided by statute. (State Const., art. 1, § 7.) The power of eminent domain is the right of the State, as sovereign, to take private property for public use upon making just compensation. The State has all the power of eminent domain there is and all that any sovereign has, subject to the limitations of the Constitution. Although exercised under our first Constitution, it is not mentioned therein, and it is now mentioned only for the purpose of limitation. The language of the revised Constitution is as follows: "No person * * * shall be deprived of life, liberty or property without due process of law; nor shall private

property be taken for public use, without just compensation;"
153 and "when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law." (Const., art. 1, §§ 6 and 7.) This language, which presupposes the existence of the power outside of the Constitution, simply regulates the right to use it. It does not confer the power, but recognizing its existence, surrounds it with proper limitations. It prescribes no method of action, when the State acts for itself, but marks out certain boundaries which may not be crossed, even by the State. Within those boundaries the State, acting through that department which exerts the legislative power, may proceed at will, and the extent, method and necessity of exercising the power to take private property for public use may not be interfered with by either of the other departments of government. (Garrison *v.* City of New York, 88 U. S., 196.) All private property, both tangible and intangible, is subject to the right, including that already devoted to a public use, although the latter, as matter of policy rather than of right, is protected and favored by the State to some extent. (People *v.* Kerr, 27 N. Y., 188; Matter of the City of Buffalo, 68 N. Y., 167.) While the State may delegate the power to a subject for a public use, it cannot permanently part with it as to any property under its jurisdiction, but may resume it at will, subject to proper rights and the duty of paying therefor. There is no limitation upon the exercise of the power except that the use must be public; compensation must be made and due process of law observed. (Secombe *v.* R. R. Co., 90 U. S., 108; Matter of Fowler, 53 N. Y., 60, 62.) Now, what does the phrase "due process of law" mean, when thus applied to the exercise of a sovereign power, and to the effort of government through that power to accomplish a great public purpose? Does it have the same meaning as when applied to the action of the State in punishing a man for crime, or of one individual in seeking to enforce a civil right against another? Due process of law necessarily varies with the facts of the case and depends upon the necessity for safeguards against the exercise of arbitrary power. It consists in the observance of those safeguards which time and experience have shown are necessary to protect the citizen in the enjoyment of life, liberty and property. In public prosecutions, as well as private controversies, an opportunity to be heard is essential to protect private rights; but here we have a case where the State has the right to take a man's property against his will, although he has been guilty of no wrong. It is a case where of necessity, if there is any action at all, it must be arbitrary. The State needs the property and takes it, and while the citizen cannot resist, he has the right to insist upon just compensation to be ascertained by an impartial tribunal. It is a compulsory purchase by public authority, and the individual receives money in the place of the property taken.
He has a right to his day in court on the question of com-
154 pensation, but he has no right to a day in court on the question of appropriation by the State unless some statute requires

it. (Matter of Village of Middletown, 82 N. Y., 196, 201.) There is no necessity for any safeguard against taking, because the right to take is all there is of the power of eminent domain, and is necessarily conceded to exist when the existence of the power is admitted. Safeguards become necessary only when the question of compensation is reached, and then the courts are careful to see that the owner receives all that he is entitled to. Until then the courts could not help him, unless some statutory right were invaded, as the method of taking is within the exclusive control of the legislature. If a statute requires judgment of condemnation, judgment must be had accordingly before the property can be taken, but otherwise a certificate of condemnation by an executive officer, followed by payment, satisfies every requirement of the Constitution. If the use is not public, the statute authorizing condemnation is void, but this question of law need not be settled in the proceeding to take, as it can be raised by the property-owner in a variety of ways. It would be the same in effect as if the attempt to condemn had been made without any statute whatever, and an action of trespass against those who undertook to take possession of the property would settle the question. (Wheelock *v.* Young, 4 Wend., 648.)

As we have already seen, a method of procedure based upon long-established usage is due process of law. "It is sufficient * * * to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual mode, established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case." (Dent *v.* West Virginia, 129 U. S., 114, 124.) How does the procedure prescribed by the statute under consideration stand this test? What has been the course of proceeding authorized by law when the State has sought to appropriate property for itself under all our constitutions? The most extensive exercise of the right of eminent domain by the State was in the construction and enlargement of the Erie canal. That great undertaking was authorized by chapter 262 of the Laws of 1817, entitled "An act respecting navigable communications between the great western and northern lakes and the Atlantic ocean," the third section of which provides "that it shall and may be lawful for the said canal commissioners, and each of them, by themselves and by any and every superintendent, agent and engineer employed by them, to enter upon, take possession of and use all and singular any lands, waters and streams necessary for the prosecution of the improvements intended by this act, and to make all such canals, feeders, dykes, locks, dams and other works and devices as they may think proper for making said improvements, doing nevertheless no unnecessary damage; and that in case any lands, waters or streams taken and appropriated for any of the pur-
155 poses aforesaid, shall not be given or granted to the people of this State, it shall be the duty of the canal commissioners from time to time, and as often as they think reasonable and proper, to cause application to be made to the justices of the supreme court,

or any two of them, for the appointment of appraisers," who, as the section further provides, are required "to make a just and equitable estimate and appraisal of the loss and damage, if any, over and above the benefit and advantage to the respective owners and proprietors or parties interested in the premises so required for the purposes aforesaid by and in consequence of making and constructing any of the works aforesaid." A similar provision was subsequently made for the taking of materials necessary to keep the canals in repair. (L. 1820, ch. 202, § 3.) The act providing for the enlargement of the Erie canal, as well as those authorizing the construction of the numerous collateral canals, simply conferred upon the canal commissioners the power to "enter on and take possession of and use all lands, streams and waters, the appropriation of which for the use of such canals and works shall in their judgment be necessary." (L. 1835, ch. 274, § 5; 1 R. S., 220, § 16; *id.* 662, § 109.) All the canals of the State were built under these acts, and much property of great value was appropriated solely under their provisions. For many years the powers thus conferred were in constant exercise, and although these statutes were often before the courts, not one was ever declared unconstitutional because of the summary method authorized in appropriating property. There was neither hearing nor notice, for the canal commissioners, or their agents, simply took possession of and used "all lands, streams and waters" which they deemed necessary for the use of the canals. This completed the condemnation, except that the damages when ascertained were paid by the State. Under some of the acts, if the property-owners filed their claims within one year after the appropriation, they received the amount awarded by the appraisers, and unless they filed their claims within the period mentioned they received nothing in the absence of special legislation. Adjudications made many years ago, and acquiesced in ever since, sustained, some directly and others indirectly, the constitutionality of this legislation, and without further discussion we hold that the statute under consideration is not unconstitutional because it does not provide for condemnation by due process of law. (Wheelock *v.* Young, 4 Wend., 647; Jerome *v.* Ross, 7 Johns. Ch., 315; Rogers *v.* Bradshaw, 20 Johns., 735.)

Just compensation, to be ascertained in the absence of agreement by an impartial tribunal, is an absolute right belonging to the owner of the property taken, but it is not necessary to provide for payment in advance, if a certain, convenient and adequate source and means of payment is provided. A distinction is made between direct action by the State and action under power delegated to a corporation created by the State, as the one is presumed to
156 be solvent while the other is not. Where, as in this case, the treasury of the State is pledged to meet the claim, payment need not be concurrent with the taking. (Matter of Mayor, etc., 99 N. Y., 569.)

It is, however, contended, and the learned appellate division, by a majority vote, has so held, that the defendant, by filing its map and serving notice upon the occupants, acquired a lien, good even

as against the State, which entitled it to notice and compensation as an owner.

The act under which the plaintiff proceeded provides for service upon and compensation to the owners only. (L. 1897, ch. 220, §§ 4 and 5.) It differs in these respects from the canal statutes above referred to, which provided for no service upon any one, but authorized "every person interested in premises so appropriated" to file a claim for compensation. (1 R. S. (6th ed.), 647, § 16, and 659, § 48.) The theory of the statute before us is, that money is substituted for land, for by the 19th section provision is made for liens and incumbrances by the deposit of the amount awarded to the claimant, "to be paid and distributed to the persons entitled to the same as directed by the judgment" of the Court of Claims. (L. 1897, ch. 220, § 19.) Whether this provision is in all cases adequate, inasmuch as it does not necessarily give the owner of a lien on the premises, created by contract, such as a mortgage, an opportunity to be heard as to the amount of compensation, it is unnecessary to now decide, for, as we think, the defendant, by merely filing its map and profile and serving notice on the occupants, acquired no lien and no property right as against the State.

The map was filed in 1897, when the defendant had 985 years of corporate existence before it, and it had then been relieved for all time by the action of the railroad commissioners from the obligation of extending its road. If a lien upon the real estate covered by the map was thus created, it was good for the long period named and was virtually a perpetual incumbrance placed upon the property, which impaired its value by hindering sales and preventing improvements, and yet the holder of the lien was neither obliged to do anything by virtue thereof for the benefit of the public, nor even to compensate the owner. No action had been taken or money expended to extend the road when the State acted. Did the State by creating the defendant and giving it the power of eminent domain place in its hands a weapon to be used against itself? No argument is required to refute an absurdity. It may be said, however, that if the filing of a map created a lien good as against the State, it created one good as against the owner of the fee, with no obligation to make compensation, yet this would be a violation of the constitution and it has been so adjudged by this court. (Forster *v.* Scott, 136 N. Y., 537.)

But assuming it to be a lien, or something in the nature of a lien, as it was created by statute and not by contract, it can be done away with by statute, without liability to make compensation, unless some vested right has accrued under it.

157 Under a statute substantially like the one before us, so far as the point under consideration is concerned (L. 1836, ch. 242), it was held, in a well-considered case, that in proceedings to condemn land judgment creditors were not required to be made parties because they were in no sense owners; that upon completion of the proceedings and payment of the compensation to the owner, the right was acquired to possess and use the lands free from all judgment liens; that the lien of a judgment upon real estate is purely

statutory and that it is within the power of the legislature to abolish it at any time before rights have become vested; that a provision causing the lien of a judgment, which has not ripened into a title, to be superseded by the taking of the land through the right of eminent domain, on payment of compensation to the owner of the land only, is valid. (Watson *v.* N. Y. C. R. R. Co., 47 N. Y., 157.) In deciding that case Judge Rapallo said: "A judgment creditor of an owner has no estate or proprietary interest in the land. He stands wholly upon the law, which gives him a remedy for the collection of his debt by a sale of the land under execution, in case sufficient personal property of the debtor should not be found. This remedy is not secured by contract, but is purely statutory. * * * The duration of this lien and the mode of its enforcement and discharge are subjects which appertain to the laws for the collection of debts; and the rules upon those subjects have been changed, from time to time, according to the will of the legislature. The power of the legislature to regulate those matters cannot be doubted. Acts have been passed shortening and lengthening the duration of the liens of existing judgments, and even providing for their extinguishment without any proceeding to which the judgment creditor was a party. * * * It is clearly within the power of the legislature to abolish the lien of all judgments at any time before rights have become vested or estates acquired under them. * * * This would be no greater exercise of power than the abolition of the right of distress for rent, or of the lien of the landlord on property taken in execution, or of the right of imprisoning the debtor. Yet the validity of such laws has been fully recognized even where they affected existing claims or judgments. They do not take away property, or affect the obligation of contracts, but simply affect legal remedies. There can, therefore, be no doubt of the validity of a provision causing the lien of a judgment, not ripened into a title by a sale, to be superseded by the taking of the land under proceedings in exercise of the right of eminent domain, on payment of compensation to the owner of the land. We think that the act of 1836 had that effect." After analyzing the act which, as already stated, is on all fours with the act under consideration, the learned judge continued: "The whole amount of this appraisement is directed to be paid to the owners. There is no provision for assessing the value of the interest of the owners, subject to the lien of judgments, or for retaining any part of the value of the land as indemnity against
158 such judgments. The whole value must be paid to the owners, or deposited in bank, and the owners are left to pay their own debts. The act then states what right the company shall obtain by virtue of such payment to the owners, and the order made thereupon. On the completion of the proceedings, the company is declared to be possessed of the land during its corporate existence, with the right to use the same for the purposes of the road. This declaration excludes the implication, that, after the owners have been compensated, the right of any other person to interfere with the possession or use of the land is reserved, or that, in order to retain such use, the company is bound to satisfy liens of judgment

creditors, after having been compelled to pay the whole value of the land to the owner. What recourse the judgment creditor might obtain in equity upon the proceeds paid to, or deposited to the credit of the owner, is a question not involved in this controversy; neither is it necessary to consider how the rights of mortgagees would be affected by the proceeding, or what protection they could obtain. The matter of the lien of judgments being wholly under the control of the legislature, they had power to confer upon the company the right of possession and use of the land free from all such liens, on paying the value of the land to the owner; and we think it was manifestly their intention so to do, modifying to that extent the laws giving liens to judgment creditors."

We can see no difference in principle between that case and this. Neither the lien of the judgment in that case, nor the pretended lien of the map in this, was created by contract, and no vested right had accrued under either. The State, therefore, had absolute control of the subject in the one case as much as the other. If there was any lien in the case before us it was created by statute and could be abolished by statute, either after the map was filed, or by doing away in advance with the ordinary effect of the map if filed after the passage of the act, which, when reasonably construed, in the light of the broad purpose to be accomplished, had that effect in this case the same as it had in the Watson case. See, also, Morse *v.* City of New York (8 N. Y., 110), where it is held that when lands are taken for public use under the power of eminent domain, upon payment of their value to the owner of the fee, the public acquires an absolute title divested of the wife's inchoate right of dower.

We do not think, however, that any lien, or any right in the nature of a lien, can be created as against the State by the simple filing of a map by a corporation organized to construct a railroad. As there is no language expressly giving it that effect, in the nature of things the legislature did not intend to clothe a creature of the State with the right to hold up the paramount power and compel it to pay money for the bare filing of a map, which is not the commencement of condemnation proceedings, for it is filed under the railroad law, while condemnation is had under the Code of Civil Procedure. (R. R. Law, § 6; Code Civ. Pro., §§ 3357, 3384.) A proceed-
159 ing cannot be held to be continuous when the first act may be done over nine hundred years before the second step is taken. Even if it were inchoate condemnation, it could not be used against the State, because a delegated power of eminent domain cannot be turned against the sovereign which conferred it and which is the source of all power. What then, it may be asked, was the effect of filing the map, and what function did it perform? The effect of the map when filed was to give warning to other railroads that a certain route had been pre-empted by the defendant. It established no right against the owner, because the Constitution forbids it; it established none against the State, because its power is paramount, but as against all other railroad companies and as against all other creatures of the State, empowered to use the right

of eminent domain, it gave the exclusive right to occupy the particular strip of land for railroad purposes until the legislature authorized it to be devoted to some other public use.

The general language used in certain cases relied upon by the defendant should be read in the light of the facts then before the court. (Rochester, etc., R. R. Co. *v.* New York, etc., R. R. Co., 110 N. Y., 128; Suburban Rapid Transit Co. *v.* Mayor, etc., 128 N. Y., 510.) These cases simply involved controversies between corporations created by the State as to a located line, the legislation necessary to enable one corporation to condemn land previously condemned by another and the like. The State was not a party to any of them, and the only question involved was as to which corporation was ahead. The so-called lien was simply an exclusive right of one of two contending railroad corporations, as against the other, to build a road on a certain piece of land, or of a railroad corporation to hold land already condemned for a public use, as against a city seeking to condemn it for another public use, without special authority from the legislature. The general effect of filing a map was not involved, but the particular effect as between two corporations, each trying to get the same land. The paramount right of the State to modify statutes, before vested rights have been acquired under them, was not involved. Here the question arises between the State and one of its creatures, and the claim that a lien, good as against the creator of the corporation, was placed upon the land simply by the grant of a franchise to exist as a corporation in order to build a road, followed by the filing of a map of the proposed route and notice thereof to the occupants, but by nothing else, cannot be sustained. There is no property in a naked railroad route, existing on paper only, that the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation. (Pearsall *v.* Great Northern R'y, 161 U. S., 646; Bank of Commerce *v.* Tennessee, 163 U. S., 416, 424; Galveston, etc., R'y Co. *v.* Texas, 170 U. S., 226, 240; Matter of Rensselaer, etc., R. R. Co., 43 N. Y., 137; Matter of Washington Park Commissioners, 56 N. Y., 144;
160 N. Y. C. & H. R. R. R. Co. *v.* Aldridge, 135 N. Y., 83; Archibald *v.* N. Y. C. & H. R. R. R. Co., 157 N. Y., 574.)

That the use for which the land in question was appropriated is a public use cannot well be questioned. The object of the legislature was to create a great public park for the promotion not only of health and pleasure, but of commerce as well. The statute declares that it is "for the free use of all the people for their health and pleasure," as well as "the preservation of the head-waters of the chief rivers of the State, and a future timber supply." (L. 1895, ch. 395, § 270.) The creation of the park is a part of the permanent policy of the State, for the people have imbedded the project in the constitution and have made the lands devoted to the purpose absolutely inalienable. (Const., art. 7, § 7.) The use is not restricted, either by legislation or circumstances, to a special locality, or to a limited number of inhabitants, but is extended to all the people. If authorities are needed to show that property taken for a public

park is taken for a public use, the following may be consulted: Shoemaker *v.* U. S. (147 U. S., 252); Brooklyn Park Commissioners *v.* Armstrong (45 N. Y., 234); Matter of Central Park (63 Barb., 282); Lewis, Eminent Domain (§ 175); 10 Am. & Eng. Encyc. (2nd ed.), 1084.

Considering the language of the constitution and statute, the situation, nature and object of the park, the constitutional inhibition against transferring any part of it, the well-known danger of destruction of forest lands by fires communicated by locomotives, and it is clear that the two uses, for such a park and for a railroad operated by steam, are inconsistent public uses which cannot stand together. The primary object of the park, which was created as a forest preserve, was to save the trees for the threefold purpose of promoting the health and pleasure of the people, protecting the water supply as an aid to commerce and preserving timber for use in the future. The command of the constitution, that the lands of the forest preserve cannot be "taken by any corporation, public or private," shows an unmistakable intention to keep railroads out of the Adirondack park.

There are other questions in the case, but they cannot be discussed without unduly lengthening this opinion. After examining them all, we are of the opinion that the order appealed from should be reversed and the judgment entered upon the decision of the special term affirmed, with costs.

All concur (Gray, J., in result, upon the ground that the act of 1897, under which the forest preserve board acted, was constitutional, and the State acquired the land in question by the exercise of a power which superseded any lien the defendant might have obtained by the initiatory steps taken, and Haight, J., concurs in result).

Order reversed and judgment entered upon the decision of the special term affirmed.

A copy.

E. H. SMITH,
State Reporter.

R.

161 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein The Adirondack Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Alton B. Parker this 20th day of October, in the year one thousand eight hundred and ninety-nine.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

Sufficient service of the foregoing citation and receipt of a copy thereof admitted this 20th day of October, 1899.

JOHN C. DAVIES,
Attorney General of the State of New York, Attorney for Defendants in Error in Court Below.
EDWARD WINSLOW PAIGE,
Of Counsel.

Endorsed: Filed October 20th, 1899.

162 STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, W. H. Shankland, clerk of the court of appeals of said State of New York, do hereby certify that the annexed papers constitute and are the original writ of error allowed herein by the Honorable Alton B. Parker, chief judge of the court of appeals, and true copies of the petition for said writ, of the bond filed upon the granting of said writ, of the record and proceedings upon which said court of appeals acted in rendering judgment herein, of the judgment and opinion of said court, and of the citation herein, with proof of service thereof, and of the whole of each and every of said papers, the originals of all which were duly filed with the clerk of the court of appeals.

Seal Court of Appeals, State of New York.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this thirtieth day of October, A. D. 1899.

W. H. SHANKLAND, *Clerk.*

163 [Endorsed:] Adirondack Railway Company, plaintiff in error, against The People of the State of New York, defendants in error. Writ of error and return. R. Burnham Moffat, attorney for plaintiff in error, 63 Wall street, New York.

164 In the Supreme Court of the United States, October Term, 1899.

ADIRONDACK RAILWAY COMPANY, Plaintiff in Error,
against
THE PEOPLE OF THE STATE OF NEW YORK, Defendants in Error.

Afterwards, to wit, on this third day of November, in the year one thousand eight hundred and ninety-nine, comes the said Adirondack Railway Company, by R. Burnham Moffat, its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I. That there was no sufficient evidence to warrant the court below in holding that at any time on or prior to the 7th of October, 1897, on which day notices of *lis pendens* in the condemnation proceedings were filed, recorded, and indexed, as required by statute, the State of New York had acquired or then held any equitable ownership of or interest in the six-rod strip of land across township 15, and the effect of the erroneous ruling by the court below that on said 7th day of October, 1897, the State of New York had acquired and did then hold an equitable ownership of or interest in said six-rod strip was to deprive the plaintiff in error of its property without due process of law and without any compensation whatso-
165 ever therefor, in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

II. That the court below erred in its ruling that the State of New York acquired or could acquire by the voluntary grant from the Indian River Company of said six-rod strip of land any larger interest therein than the grantor was seized or possessed of, and the effect of such erroneous ruling by said court was to deny to the plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive the plaintiff in error of its property without due process of law and without any compensation whatsoever therefor, all in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

III. That the court below erred in its ruling that so much of chapter 220 of the Laws of 1897 as authorized the seizure by the forest preserve board of lands lying within the limits of the Adirondack park was a valid enactment, for the reason that said provisions authorize the taking of private property for an alleged public use without due process of law and without providing for the making of compensation to the owners of the property so taken, in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

IV. That the court below erred in its ruling that the enactment by the legislature of the State of New York of chapter 220
166 of the Laws of 1897 was a valid enactment, for its effect as declared by said court was to deprive this plaintiff in error of its right to extend the line of its road across said six-rod strip. The right so possessed by the plaintiff in error and pursuant to which it was proceeding was a franchise theretofore granted to it by the State of New York constituting a valid and subsisting contract between the people of said State and this plaintiff in error. The law of 1897, therefore, as construed and declared by the court below impaired and put an end to the obligation of such contract on the part of said People of the State of New York, in violation of the provisions, restrictions, and safeguards of section ten of article one of the Constitution of the United States.

V. That the court below erred in its ruling that by the proceedings had under chapter 220 of the Laws of 1897 the State of New York acquired an ownership of said six-rod strip exclusive as against

the plaintiff in error, for the effect of such ruling was to deny to the plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive this plaintiff in error without due process of law and without any compensation whatsoever therefor of its vested franchise or property right to extend the line of its road over such six-rod strip, all in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

167 VI. That the court below erred in its ruling that by the proceedings had under chapter 220 of the Laws of 1897 the right of the plaintiff in error to extend the line of its road across said six-rod strip was in anywise defeated or even affected. Under the statutes of the State of New York, as uniformly interpreted and construed by the court of last resort thereof, a railroad corporation organized and existing under the laws of said State acquired upon its doing what the evidence discloses had been done by this plaintiff in error an indestructible and valuable property right, of which it could be deprived *in invitum* only by due process of law and upon the making to it of compensation therefor. The effect of such erroneous ruling by the court below was to deny to the plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive it without due process of law and without any compensation whatsoever therefor of its said property right to extend the line of its road over such six-rod strip, all in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

VII. That the court below erred in its ruling that notwithstanding its conceded compliance with the provisions of the statute law of the State of New York for the extension of the line of its road the plaintiff in error acquired no lien upon, easement over, or right in or to said six-rod strip which it could assert against the Indian River Company or against the State of New York. The plaintiff in error was proceeding under a franchise which necessarily gave to it such lien, easement, or right, which constituted and was a part of said franchise, and the effect of such ruling of the court be-

168 low was to impair the obligation thereof on the part of the State, in violation of the provisions, restrictions, and safeguards of section ten of article one of the Constitution of the United States.

VIII. That the court below erred in its assumption that the plaintiff in error had done nothing to extend its line across said six-rod strip beyond filing a map and profile and serving notice on the occupants, as required by statute; for it appeared to the court by competent and unquestioned evidence that the plaintiff in error had invested divers sums of money in full reliance upon its franchise or vested right so to extend the line of its road over such six-rod strip. The effect of the erroneous assumption of the court below in this regard was to deprive this plaintiff in error without due process of law and without any compensation whatsoever therefor of its vested franchise or property right so to extend the line of its

road, in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States.

IX. That the court below erred in its ruling that the People of the State of New York ever acquired the title to or interest in said six-rod strip, except as subject to the right of this plaintiff in error to construct, maintain, and operate its railroad thereover, and the effect of such erroneous ruling was to deny to plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive this plaintiff in error of its property without due process of law and without any compensation whatsoever therefor, all in violation of the provisions, restrictions, and safe-
169 guards of the fourteenth amendment to the Constitution of the United States.

X. That the court below erred in its ruling that this plaintiff in error was not at the time of the commencement of this action and is not now lawfully possessed of the right to construct, maintain, and operate its railroad over said six-rod strip, and the effect of such erroneous ruling was to deny to plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive this plaintiff in error of its property without due process of law and without any compensation whatsoever therefor, and to impair the obligation of a valid and subsisting contract between the People of the State of New York and this plaintiff in error, all in violation of the provisions, restrictions, and safeguards of the fourteenth amendment to the Constitution of the United States and of section ten of article one of said Constitution.

XI. That the court below erred in reversing the order of the appellate division of the supreme court of the State of New York and in affirming the judgment of the special term of said supreme court with costs, and the effect of such ruling by the court below was to deny to this plaintiff in error an equal protection with other citizens of its property rights and of the laws, and to deprive this plaintiff in error of its property without due process of law and without any compensation whatsoever therefor, and to impair the obligation of a valid and subsisting contract between the People of the State of New York and this plaintiff in error, all in violation of the provisions, restrictions, and safeguards of the fourteenth
170 amendment to the Constitution of the United States and of section ten of article one of said Constitution.

Dated November 3rd, 1899.

R. BURNHAM MOFFAT,
Attorney for Plaintiff in Error, 63 Wall Street, New York.

171 [Endorsed:] Adirondack Railway Company, pl'ff in error, *vs.* The People of the State of New York, def'ts in error. Original. Assignments of error. R. Burnham Moffat, attorney for plaintiff in error, 63 Wall street, New York city.

Endorsed on cover: File No., 17,553. New York court of appeals. Term No., 439. The Adirondack Railway Company, plaintiff in error, *vs.* The People of the State of New York. Filed November 3rd, 1899.